APPENDIX A

TREATY AND STATUTES INVOLVED

EXHIBIT A

MEDICINE CREEK TREATY

FRANKLIN PIERCE
President of the United States of America.

TO ALL AND SINGULAR TO WHOM THESE PRESENTS SHALL COME, GREETING:

WHEREAS a treaty was made and concluded on the She-nah-nam, or Medicine Creek, in the Territory of Washington, on the twenty-sixth day of December, one thousand eight hundred and fifty-four, between the United States of America and the Nisqually and other bands of Indians, which treaty is in the words following, to wit:—

Articles of agreement and convention made and concluded on the She-nah-nam, or Medicine Creek, in the Territory of Washington, this twenty-sixth day of December, in the year one thousand eight hundred and fifty-four, by Isaac L. Stevens, governor and superintendent of Indian affairs of the said Territory, on the part of the United States, and the undersigned chiefs, headmen, and delegates of the Nisqually, Puyallup, Steilacoom, Squawksin, S'Homamish, Steh-chass, T'Peeksin, Squi-aitl, and Sa-heh-wamish tribes and bands of Indians, occupying the lands lying round the head of Puget's Sound and the adjacent inlets, who, for the purpose of this treaty, are to be regarded as one nation, on behalf of said tribes and bands, and duly authorized by them.

ARTICLE I. The said tribes and bands of Indians hereby cede, relinquish, and convey to the United States, all their right, title, and interest in and to the lands and country occupied by them, bounded and described as follows, to wit: Commencing at the point on the eastern side of Admiralty Inlet, known as Point Pully, about

midway between Commencement and Elliott Bays; thence running in a southeasterly direction, following the divide between the waters of the Puyallup and Dwamish, or White rivers, to the summit of the Cascade Mountains; thence southerly, along the summit of said range, to a point opposite the main source of the Skookum Chuck Creek; thence to and down said creek, to the coal mine; thence northwesterly, to the summit of the Black Hills; thence northerly, to the upper forks of the Satsop River; thence northeasterly, through the portage known as Wilkes's Portage, to Point Southworth, on the western side of Admiralty Inlet; thence around the foot of Vashon's Island, easterly and southeasterly, to the place of beginning.

ARTICLE II. There is, however, reserved for the present use and occupation of the said tribes and bands, the following tracts of land, viz: The small island called Klah-che-min, situated opposite the mouths of Hammersley's and Totten's inlets, and separated from Hartstene Island by Peale's Passage, containing about two sections of land by estimation; a square tract containing two sections, or twelve hundred and eighty acres, on Puget's Sound, near the mouth of the She-nah-nam Creek, one mile west of the meridian line of the United States land survey, and a square tract containing two sections, or twelve hundred and eighty acres, lying on the south side of Commencement Bay; all which tracts shall be set apart, and, so far as necessary, surveyed and marked out for their exclusive use; nor shall any white man be permitted to reside upon the same without permission of the tribe and the superintendent or agent. And the said tribes and bands agree to remove to and settle upon the same within one year after the ratification of this treaty, or sooner if the means are furnished them. In the mean time, it shall be lawful for them to reside upon any ground not in the actual claim and occupation of citizens of the United States, and upon any ground claimed or occupied, if with the permission of the owner or claimant. If necessary for the public convenience, roads may be run through their reserves, and, on the other hand, the right of way with free access from the same to the nearest public highway is secured to them.

ARTICLE III. The right of taking fish, at all usual and accustomed grounds and stations, is further secured to said Indians, in common with all citizens of the Territory, and of erecting temporary houses for the purpose of curing, together with the privilege of hunting, gathering roots and berries, and pasturing their horses on open and unclaimed lands: *Provided, however,* That they shall not take shell fish from any beds staked or cultivated by citizens, and that they shall alter all stallions not intended for breeding horses, and shall keep up and confine the latter.

ARTICLE IV. In consideration of the above cession, the United States agree to pay to the said tribes and bands the sum of thirty-two thousand five hundred dollars, in the following manner, that is to say: For the first year after the ratification hereof, three thousand two hundred and fifty dollars; for the next two years, three thousand dollars each year; for the next three years two thousand dollars each year; for the next four years fifteen hundred dollars each year; for the next five years twelve hundred dollars each year, and for the next five years one thousand dollars each year; all which said sums of money shall be applied to the use and benefit of the said Indians, under the direction of the President of the United States, who may from time to time determine, at his discretion, upon what beneficial objects to expend the same. And the superintendent of Indian affairs, or other proper officer, shall each year inform the President of the wishes of said Indians in respect thereto.

ARTICLE V. To enable the said Indians to remove to and settle upon their aforesaid reservations, and to clear, fence, and break up a sufficient quantity of land for cultivation, the United States further agree to pay the sum of three thousand two hundred and fifty dollars, to be laid out and expended under the direction of the President, and in such manner as he shall approve.

ARTICLE VI. The President may hereafter, when in his opinion the interests of the Territory may require, and the welfare of the said Indians be promoted, remove them from either or all of said reservations to such other suitable place or places within said Territory as he may

deem fit, on remunerating them for their improvements and the expenses of their removal, or may consolidate them with other friendly tribes or bands. And he may further, at his discretion, cause the whole or any portion of the lands hereby reserved, or of such other land as may be selected in lieu thereof, to be surveyed into lots, and assign the same to such individuals or families as are willing to avail themselves of the privilege, and will locate on the same as a permanent home, on the same terms and subject to the same regulations as are provided in the sixth article of the treaty with the Omahas, so far as the same may be applicable. Any substantial improvements heretofore made by any Indian, and which he shall be compelled to abandon in consequence of this treaty, shall be valued under the direction of the President, and payment be made accordingly therefor.

ARTICLE VII. The annuities of the aforesaid tribes and bands shall not be taken to pay the debts of individuals.

ARTICLE VIII. The aforesaid tribes and bands acknowledge their dependence on the government of the United States, and promise to be friendly with all citizens thereof, and pledge themselves to commit no depredations on the property of such citizens. And should any one or more of them violate this pledge, and the fact be satisfactorily proved before the agent, the property taken shall be returned, or in default thereof, or if injured or destroyed, compensation may be made by the government out of their annuities. Nor will they make war on any other tribe except in self-defence, but will submit all matters of difference between them and other Indians to the government of the United States, or its agent, for decision, and abide thereby. And if any of the said Indians commit any depredations on any other Indians within the Territory, the same rule shall prevail as that prescribed in this article, in cases of depredations against citizens. And the said tribes agree not to shelter or conceal offenders against the laws of the United States, but to deliver them up to the authorities for trial.

ARTICLE IX. The above tribes and bands are desirous to exclude from their reservations the use of ardent spirits, and to prevent their people from drinking the same; and,

therefore, it is provided, that any Indian belonging to said tribes, who is guilty of bringing liquor into said reservations, or who drinks liquor, may have his or her proportion of the annuities withheld from him or her for such time as the President may determine.

ARTICLE X. The United States further agree to establish at the general agency for the district of Puget's Sound, within one year from the ratification hereof, and to support, for a period of twenty years, an agricultural and industrial school, to be free to children of the said tribes and bands, in common with those of the other tribes of said district, and to provide the said school with a suitable instructor or instructors, and also to provide a smithy and carpenter's shop, and furnish them with the necessary tools, and employ a blacksmith, carpenter, and farmer, for the term of twenty years, to instruct the Indians in their respective occupations. And the United States further agree to employ a physician to reside at the said central agency, who shall furnish medicine and advice to their sick, and shall vaccinate them; the expenses of the said school, shops, employees, and medical attendance, to be defrayed by the United States, and not deducted from the annuities.

ARTICLE XI. The said tribes and bands agree to free all slaves now held by them, and not to purchase or acquire others hereafter.

ARTICLE XII. The said tribes and bands finally agree not to trade at Vancouver's Island, or elsewhere out of the dominions of the United States; nor shall foreign Indians be permitted to reside in their reservations without consent of the superintendent or agent.

ARTICLE XIII. This treaty shall be obligatory on the contracting parties as soon as the same shall be ratified by the President and Senate of the United States.

In testimony whereof, the said Isaac I. Stevens, governor and superintendent of Indian Affairs, and the undersigned chiefs, headmen, and delegates of the aforesaid tribes and bands, have hereunto set their hands and

seals at the place and on the day and year hereinbefore written.

ISAAC I. STEVENS,
Governor and Superintendent Territory of Washington.

Qui-ee-metl,	his x mark. [L. S.]
Sno-ho-dumset,	his x mark. [L. S.]
Lesh-high,	his x mark. [L. S.]
Slip-o-elm,	his x mark. [L. S.]
Kwi-ats,	his x mark. [L. S.]
Stee-high,	his x mark. [L. S.]
Di-a-keh,	his x mark. [L. S.]
Hi-ten,	his x mark. [L. S.]
Squa-ta-hun,	his x mark. [L. S.]
Kahk-tse-min,	his x mark. [L. S.]
Sonan-o-yutl,	his x mark. [L. S.]
Kl-tehp,	his x mark. [L. S.]
Sahl-ko-min,	his x mark. [L. S.]
T'bet-ste-heh-bit,	his x mark. [L. S.]
Tcha-hoos-tan,	his x mark. [L. S.]
Ke-cha-hat,	his x mark. [L. S.]
Spee-peh,	his x mark. [L. S.]
Swe-yah-tum,	his x mark. [L. S.]
Chah-achsh,	his x mark. [L. S.]
Pich-kehd,	his x mark. [L. S.]
S'klah-o-sum,	his x mark. [L. S.]
Sah-le-tatl,	his x mark. [L. S.]
See-lup,	his x mark. [L. S.]
E-la-kah-ka,	his x mark. [L. S.]
Slug-yeh,	his x mark. [L. S.]
Hi-nuk,	his x mark. [L. S.]
Ma-mo-nish,	his x mark. [L. S.]
Cheels,	his x mark. [L. S.]
Knutcanu,	his x mark. [L. S.]
Bats-ta-kobe,	his x mark. [L. S.]
Win-ne-ya,	his x mark. [L. S.]
Klo-out,	his x mark. [L. S.]
Se-uch-ka-nam,	his x mark. [L. S.]
Ske-mah-han,	his x mark. [L. S.]
Wuts-un-a-pum,	his x mark. [L. S.]
Quut-a-tadm,	his x mark. [L. S.]
Quut-a-heh-mtsn,	his x mark. [L. S.]

Yah-leh-chn,	his x mark. [L. S.]
To-lahl-kut,	his x mark. [L. S.]
Yul-lout,	his x mark. [L. S.]
See-ahts-oot-soot,	his x mark. [L. S.]
Ye-tahko,	his x mark. [L. S.]
We-po-it-ee,	his x mark. [L. S.]
Kah-sld,	his x mark. [L. S.]
La'h-hom-kan,	his x mark. [L. S.]
Pah-how-at-ish,	his x mark. [L. S.]
Swe-yehm,	his x mark. [L. S.]
Sah-hwill,	his x mark. [L. S.]
Se-kwaht,	his x mark. [L. S.]
Kah-hum-klt,	his x mark. [L. S.]
Yah-kwo-bah,	his x mark. [L. S.]
Wut-sah-le-wun,	his x mark. [L. S.]
Sah-ba-hat,	his x mark. [L. S.]
Tel-e-kish,	his x mark. [L. S.]
Swe-keh-nam,	his x mark. [L. S.]
Sit-oo-ah,	his x mark. [L. S.]
Ko-quel-a-cut,	his x mark. [L. S.]
Jack,	his x mark. [L. S.]
Keh-kise-be-lo,	his x mark. [L. S.]
Go-yeh-hn,	his x mark. [L. S.]
Sah-putsh,	his x mark. [L. S.]
William,	his x mark. [L. S.]

Executed in the presence of us:—

M. T. Simmons, *Indian Agent.*
James Doty, *Secretary of the Commission.*
C. H. Mason, *Secretary Washington Territory.*
W. A. Slaughter, 1*st Lieut. 4th Infantry.*
James McAlister,
E. Giddings, Jr.
George Shazer,
Henry D. Cock,
S. S. Ford, Jr.
John W. McAlister,
Clovington Cushman,
Peter Anderson,
Samuel Klady,
W. H. Pullen,

P. O. Hough,
E. R. Tyerall,
George Gibbs,
Benj. F. Shaw, *Interpreter*,
Hazard Stevens.

And whereas the said treaty having been submitted to the Senate of the United States, for its constitutional action thereon, the Senate did, on the third day of March, one thousand eight hundred and fifty-five, advise and consent to the ratification of its articles by a resolution in the words and figures following, to wit:—

"In Executive Session, Senate of the United States,
"*March* 3, 1855.

"*Resolved*, (two thirds of the senators present concurring.) That the Senate advise and consent to the ratification of the articles of agreement and convention made and concluded on the She-nah-nam, or Medicine Creek, in the Territory of Washington, this twenty-sixth day of December, in the year one thousand eight hundred and fifty-four, by Isaac I. Stevens, governor and superintendent of Indian affairs of the said Territory, on the part of the United States, and the undersigned chiefs, headmen, and delegates of the Nisqually, Puyallup, Steilacoom, Squawksin, S'Homamish, Steth-chass, T'Peeksin, Squi-aitl, and Sa-heh-wamish tribes and bands of Indians occupying the lands lying round the head of Puget's Sound and the adjacent inlets, who, for the purpose of this treaty, are to be ragarded as one nation, on behalf of said tribes and bands, and duly authorized by them.

"Attest:
ASBURY DICKINS, *Secretary*."

Now, therefore, be it known that I, FRANKLIN PIERCE, President of the United States of America, do, in pursuance of the advice and consent of the Senate, as expressed in their resolution of the third day of March, one thousand eight hundred and fifty-five, accept, ratify, and confirm the said treaty.

In testimony whereof, I have caused the seal of the

United States to be hereto affixed, having signed the same with my hand.

[L. s.] Done at the city of Washington, this tenth day of April, in the year of our Lord one thousand eight hundred and fifty-five, and of the independence of the United States the seventy-ninth.

FRANKLIN PIERCE

By the President:

W. L. Marcy, *Secretary of State.*

FEDERAL STATUTES INVOLVED

62 Stat. 757. 18 U.S.C. 1151. Indian country defined

Except as otherwise provided in sections 1154 and 1156 of this title, the term "Indian country," as used in this chapter, means (a) all land within the limits of any Indian reservation under the jurisdiction of the United States government, notwithstanding the issuance of any patent, and, including rights-of-way running through the reservation, (b) all dependent Indian communities within the borders of the United States whether within the original or subsequently acquired territory thereof, and whether within or without the limits of a state, and (c) all Indian allotments, the Indian titles to which have not been extinguished, including rights-of-way running through the same. June 25, 1948, c. 645, 62 Stat. 757; May 24, 1949, c. 139, Sec. 25, 63 Stat. 94.

67 Stat. 588, 18 U.S.C. 1162. State jurisdiction over offenses committed by or against Indians in the Indian country

(a) Each of the States or Territories listed in the following table shall have jurisdiction over offenses committed by or against Indians in the areas of Indian country listed opposite the name of the State or Territory to the same extent that such State or Territory has jurisdiction over offenses committed elsewhere within the State or Territory, and the criminal laws of such State or Territory shall have the same force and effect within

such Indian country as they have elsewhere within the State or Territory:

Alaska	All Indian country within the Territory
California	All Indian country within the State
Minnesota	All Indian country within the State, except the Red Lake Reservation
Nebraska	All Indian country within the State
Oregon	All Indian country within the State, except the Warm Springs Reservation
Wisconsin	All Indian country within the State

(b) Nothing in this section shall authorize the alienation, encumbrance, or taxation of any real or personal property, including water rights, belonging to any Indian or any Indian tribe, band, or community that is held in trust by the United States or is subject to a restriction against alienation imposed by the United States; or shall authorize regulation of the use of such property in a manner inconsistent with any Federal treaty, agreement, or statute or with any regulation made pursuant thereto; or shall deprive any Indian or any Indian tribe, band, or community of any right, privilege, or immunity afforded under Federal treaty, agreement, or statute with respect to hunting, trapping, or fishing or the control, licensing, or regulation thereof.

(c) The provisions of sections 1152 and 1153 of this chapter shall not be applicable within the areas of Indian country listed in subsection (a) of this section. Added Aug. 15, 1953, c. 505, Sec. 2, 67 Stat. 588, and amended Aug. 24, 1954, c. 910, Sec. 1, Stat. 795; Aug. 8, 1958, Pub.L. 85—615, Sec. 1, 72 Stat. 545.

CHAPTER 37.12, REVISED CODE OF WASHINGTON

37.12.010 Assumption of criminal and civil jurisdiction by state.

The state of Washington hereby obligates and binds itself to assume criminal and civil jurisdiction over Indians and Indian territory, reservations, country, and lands within this state in accordance with the consent of the United States given by the act of August 15, 1953 (Public Law 280, 83rd Congress, 1st Session), but such

assumption of jurisdiction shall not apply to Indians when on their tribal lands or allotted lands within an established Indian reservation and held in trust by the United States or subject to a restriction against alienation imposed by the United States, unless the provisions of R.C.W. 37.12.-021 have been invoked, except for the following:

(1) Compulsory school attendance;

(2) Public assistance;

(3) Domestic relations;

(4) Mental illness:

(5) Juvenile delinquency;

(6) Adoption proceedings;

(7) Dependent children; and

(8) Operation of motor vehicles upon the public streets, alleys, roads and highways. *Provided further*, That Indian tribes that petitioned for, were granted and became subject to state jurisdiction pursuant to this chapter on or before March 13, 1963 shall remain subject to state civil and criminal jurisdiction as if chapter 36, Laws of 1963 had not been enacted.

37.12.021 Resolution of request—Proclamation by governor, 1963 act.

Whenever the governor of this state shall receive from the majority of any tribe or the tribal council or other governing body, duly recognized by the Bureau of Indian Affairs, of any Indian tribe, community, band or group in this state a resolution expressing its desire that its people and lands be subject to the criminal or civil jurisdiction of the state of Washington to the full extent authorized by federal law, he shall issue within sixty days a proclamation to the effect that such jurisdiction shall apply to all Indians and all Indian territory, reservations, country, and lands of the Indian body involved to the same extent that this state exercises civil and criminal jurisdiction or both elsewhere within the state: *Provided*, That jurisdiction assumed pursuant to this section shall nevertheless be subject to the limitations set forth in R.C.W. 37.12.060.

37.12.030 Effective date for assumption of jurisdiction—Criminal causes.

Upon March 13, 1963 the state of Washington shall assume jurisdiction over offenses as set forth in R.C.W. 37.12.010 committed by or against Indians in the lands prescribed in R.C.W. 37.12.010 to the same extent that this state has jurisdiction over offenses committed elsewhere within this state, and such criminal laws of this state shall have the same force and effect within such lands as they have elsewhere within this state.

37.12.040 Civil causes.

Upon March 13, 1963 the state of Washington shall assume jurisdiction over civil causes of action as set forth in R.C.W. 37.12.010 between Indians or to which Indians are parties which arise in the lands prescribed in R.C.W. 37.12.010 to the same extent that this state has jurisdiction over other civil causes of action and, except as otherwise provided in this chapter, those civil laws of this state that are of general application to private persons or private property shall have the same force and effect within such lands as they have elsewhere within this state.

37.12.050 State's jurisdiction limited by federal law.

The jurisdiction assumed pursuant to this chapter shall be subject to the limitations and provisions of the federal act of August 15, 1953 (Public Law 280, 83rd Congress, 1st Session).

37.12.060 Chapter limited in application.

Nothing in this chapter shall authorize the alienation, encumbrance, or taxation of any real or personal property, including water rights and tidelands, belonging to any Indian or any Indian tribe, band, or community that is held in trust by the United States or is subject to a restriction against alienation imposed by the United States; or shall authorize regulation of the use of such property in a manner inconsistent with any federal treaty, agreement, or statute or with any regulation made pursuant thereto; or shall confer jurisdiction upon the state to adjudicate, in probate proceedings or otherwise, the ownership or

right to possession of such property or any interest therein; or shall deprive any Indian or any Indian tribe, band, or community of any right, privilege, or immunity afforded under federal treaty, agreement, statute, or executive order with respect to Indian land grants, hunting, trapping, or fishing or the control, licensing; regulation thereof.

37.12.070 Tribal ordinances, customs, not inconsistent with law applicable in civil causes.

Any tribal ordinance or custom heretofore or hereafter adopted by an Indian tribe, band, or community in the exercise of any authority which it may possess shall, if not inconsistent with any applicable civil law of the state, be given full force and effect in the determination of civil causes of action pursuant to this section.

APPENDIX B

OPINIONS AND JUDGMENT BELOW

No. 158069

TRIAL COURT'S MEMORANDUM DECISION

DEPARTMENT OF GAME OF THE STATE OF WASHINGTON, and the DEPARTMENT OF FISHERIES OF THE STATE OF WASHINGTON,
Plaintiffs,
v.
THE PUYALLUP TRIBE, INC., a Federal Organization, *et al.*,
Defendants.

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON IN AND FOR PIERCE COUNTY

A few days before Christmas in 1854, Governor Stevens, representing the United States, met with representatives of the Nisqually and Puyallup Indian tribes, on the banks of Medicine Creek, and negotiated a treaty concerning land and hunting and fishing rights. The treaty was reduced to writing and signed by the authorities of the Government. It was also signed by the Indians representing their tribes, but since they could neither read nor write, their signatures were merely indicated by their mark (Ex. "A"). This treaty was ratified by President Pierce in 1855. At this time there were only a few white settlers, and the Puyallup Indians consisted of various groups with villages along the river and on the shores of Commencement Bay. Any ownership of land the Indians may have had was communal in nature.

At that time the river flowed peacefully into Commencement Bay; there were no dams on the river, no factories, no lumber mills, no commercial and industrial developments, no municipal sewage—nothing such as exists today.

The Puyallup Indians who inhabited the lower reaches

of the river and the area around Commencement Bay depended for their subsistence, to a large degree, on the fish they caught in these waters and the shellfish they found on the shores.

Article 3 of the Medicine Creek Treaty provides as follows:

> "The right of taking fish, at all usual and accustomed grounds and stations, is further secured to said Indians in common with al citizens of the Territory, and of erecting temporary houses for the purpose of curing, together with the privilege of hunting, gathering roots and berries, and pasturing their horses on open and unclaimed lands: *Provided, however,* That they shall not take shellfish from any beds staked or cultivated by citizens, and that they shall alter all stallions not intended for breeding-horses, and shall keep up and confine the latter."

Now, over a hundred years later, we are concerned with the rights of the defendants under this Article of the treaty.

Since the beginning of this action, the defendants have sought to have the same dismissed, on the grounds that this court does not have jurisdiction. This motion to dismiss has heretofore been denied, and the court adheres to the previous rulings herein on that point without further comment.

Three primary questions are presented to this court for determination. They are:

1. Is there a Puyallup tribe which succeeds in interest to the rights of the signers of the Treaty of Medicine Creek?

2. Is there an existing reservation of the Puyallup tribe, and if so, what are its boundaries?

3. Are the regulations sought to be enforced by the state reasonably necessary for the conservation of fish?

It may be that the answer to any one of these questions would obviate the necessity of answering the others;

however, in view of the facts and law involved, and the interest of the parties in the answers to all three questions, the court proposes to answer each one.

In answering these questions, it is necessary to look at the facts and the law as they exist today, and not as they existed over 100 years ago or even 50 years ago, as many changes have occurred in the intervening years.

QUESTION No. 1:

According to the testimony of Dr. Herbert C. Taylor, Jr., an anthropologist and Dean at Western Washington College, in 1790 there were about 800 to 1000 Puyallup Indians; in 1839 there were 484, in 1844, 207, and by 1854, at the time of the signing of the treaty, there were about 100.

Dr. Taylor says the lower Puyallup Indians were assimilated into the white development of the area and were destroyed as a cultural identity.

He defines a tribe as "A group of a simple kind, in a definite locality, speaking a common language, with a single government." The Puyallups in 1854 were a tribe, but are not now by this definition. They can only be identified now by inheritance.

Dr. Colin E. Twedell, also an anthropologist, was able to trace many of the individuals listed in the 1929 roll of Puyallup Indians by at least some degree of blood, back to the original signatories of the treaty. Dr. Taylor says that the Puyallup Indian culture is dead—that the only thing that survives are memories. They are now Americans by "cultural assimilation;" what was two cultures has become blended into one.

Defendants contend there is a present, existing Puyallup tribe evidenced by their tribal roll of 1929 (Ex. "H") and that it has been recognized by the Federal government, and only Congress can terminate their tribal existence. There are 344 members according to the 1929 roll.

Recognition for one purpose does not mean, however,

that there is recognition for all purposes. The fact that the government would take cognizance of a tribal roll for distribution of funds does not mean recognition as successors to the rights of signatories to the treaty. The testimony at the trial indicated that the roll was prepared to cover the distribution of funds, and that blood quantum was not a necessary prerequisite for inclusion in the roll.

Is the present Puyallup tribe any different than say the Italian-American Club, the Order of Ahepa, or Sons & Daughters of Norway? The fact that some blood relationship may be required by one organization and not by another, doesn't alter the fact that the purpose may be merely social, fraternal, et cetera.

It is urged that the tribe is more than this because they have a communal right granted by the treaty which carries on down to the present time.

The evidence indicates, however, that most of the matters considered at meetings of the tribe, or tribal council, deal with enrollment, operation of the cemetery, and the disposition of trust funds.

The only Indians who appear to assert their rights to fish, are the individual defendants other than the tribe itself. In an effort to establish the ownership of a fishing right, some of the Indians paid to the tribe a fee of $25.00 for the right to fish for a year, but there was no effort to enforce the licensing fee, and its collection was dropped. It thus appears that except as they are actively defending this suit, the tribe has not in fact at any time before asserted its communal ownership of fishing rights.

The defendants in this case are no longer wards of the government. They are citizens of the United States, and over the years have blended their status with all other citizens to the extent that they no longer retain any exclusive rights that were granted by the treaty. To say that they have any superior rights to others would make them super citizens, enjoying rights and privileges not given to others in the community.

At the time of signing the treaty, it would probably

be safe to say that they were savages. Savage, as defined in Webster's 3rd International Dictionary, is "a person living in a primitive state or belonging to a primitive society."

Would anyone assert that they are savages now? Certainly not, and they would be justifiably insulted if anyone would do so.

They are citizens of our county and state, with all the rights, privileges and responsibilities of any other citizen, no more—no less.

What have our courts said about continued recognition of a tribe? The case of *United States v. Sandoval*, 58 L.Ed. 107, a 1913 case, has been relied upon by both sides in discussing this question. The case arose out of a criminal prosecution for the sale of intoxicating liquor to the Pueblo Indians in the state of New Mexico.

The court pointed out that the lands belonging to the several Pueblos vary in quantity, but usually embrace about 17,000 acres, held in communal, fee simple ownership.

This alone would distinguish the Puyallup Indians from the Pueblos.

Further identifying the Pueblos, the court said:

> ". . . . Always living in separate and isolated communities, adhering to primitive modes of life, largely influenced by superstition and fetichism, and chiefly governed according to the crude customs inherited from their ancestors, they are essentially a simple, uninformed, and inferior people."

In 1854, the Puyallups could probably be distinguished from the white settlers on each of these characteristics, but as to each of these characteristics in 1965, there is nothing to distinguish the Indians from any citizen of the country.

The court further pointed out that the Pueblos were simple and ignorant people, dependent upon the fostering

care and protection of the government, and there was even a New Mexico statute which excluded them from the privilege of voting.

By contrast, the present Puyallups are not simple and ignorant, are not dependent upon the care and protection of the government, and have equal voting rights with all other citizens.

The court went on to say:

> "It is for Congress, not the courts to determine when the true interests of the Indian require his release from guardianship. It is only that in respect of distinctly Indian communities the questions whether, to what extent, and for what time they shall be recognized and dealt with as dependent tribes requiring the guardianship and protection of the United States are to be determined by Congress and not by the courts."

The Puyallups are not now wards of the government, are not distinctly Indians from the point of view of their status as citizens, and, therefore, this court can determine for itself how they should be recognized and dealt with.

The right of the courts to deal with Indians directly, considering their changed status was dealt with in three early cases by Judge Hanford of the U.S. District Court for the Western District of Washington.

The first was that of *United States v. Kopp*, 100 Fed. 160, a 1901 case.

Judge Hanford there said:

> ". . . Since the decision of the circuit court of appeals in that case (*Ross v. Eells*, 56 Fed. 855) the conditions have been materially changed by actual sales of a considerable part of the reservation under the provisions of the act of 1893 above referred to. It is certain that the purchasers from the commissioners appointed pursuant to that statute cannot be lawfully evicted from their property, and I hold that

by the subdivision and alienation of a considerable part of the patented land the reservation has been abolished, except the part retained as a site for an Indian training school, and use of the government for other purposes. The circuit court of appeals agreed with this court in holding that the sixth section of the act of February 8, 1887, confers the right of citizenship upon the Puyallup Indians to whom lands were patented under the treaty of 1854; and, so far as the opinion delivered by Mr. Justice McKenna indicates the mind of the court, there is no disagreement with this court as to the nature of the estate granted by the patents. I feel justified, therefore, in adhering to the conclusion reached in that case, — that each patent conveyed a title in fee simple, subject to forfeiture upon conditions subsequent, and with a restriction upon the right of alienation for a period to be determined by future legislative enactments."

The court said:

"The Puyallup Indians holding lands under patents of the tenor above set forth are citizens of the United States having all the rights, privileges and immunities of other citizens, and they are not under guardianship of the United States government, nor under the charge of any Indian superintendent or agent."

United States v. Ashton, 170 Fed. 509 (1909) was an action to quiet title to certain land, where the court held that although the tribe had not been dissolved by any formal proceeding, it was disintegrated by the enfranchisement of its members. This case will be referred to again under the question concerning the existence of the reservation and its boundaries.

In re Celestine, 114 Fed. 551 (1902) the court said.

". . . Equality of rights and of responsibilities is an incident of citizenship, and those Indians who have become citizens may be likened to the Negroes in this country since their enfranchisement by the fifteenth amendment to the constitution, of whom the

Supreme Court, in an opinion written by Mr. Justice Bradley, has said:

> "'When a man has emerged from slavery, and by the aid of beneficent legislation has shaken off the inseparable concomitants of that state, there must be some stage in the progress of his elevation when he takes the rank of a mere citizen, and ceases to be the special favorite of the laws, and when his rights as a citizen or a man are to be protected in the ordinary modes by which other men's rights are protected.' Civil Rights Cases, 109 U.S. 25, 3 Sup. Ct. 31, 27 L.Ed. 844."

It is urged that the treaty with the Indians was a treaty with a separate nation and that as such only Congress can make or change treaties—this despite the fact that the Indians individually and as a tribe, so far as that term is applicable, are within the territorial limits of the United States, and the Indians are now citizens of the United States as well.

Montoya v. United States, 45 L.Ed. 521 (1901), discusses Indians as nations in the following language:

> "The North American Indians do not, and never have, constituted 'nations' as that word is used by writers upon international law, although in a great number of treaties they are designated as 'nations' as well as tribes. Indeed, in negotiating with the Indians the terms 'nation,' 'tribe,' and 'band' are used almost interchangeably. The word 'nation' as ordinarily used pre-supposes or implies an independence of any other sovereign power more or less absolute, an organized government, recognized officials, a system of laws, definite boundaries, and the power to enter into negotiations with other nations. These characteristics the Indians have possessed only in a limited degree, and when used in connection with the Indians, especially in their original state, we must apply to the word 'nation' a definition which indicates little more than a large tribe or a group of affiliated tribes possessing a common government, language, or racial origin, and acting, for the time being,

in concert. Owing to the natural infirmities of the Indian character, their fiery tempers, impatience of restraint, their mutual jealousies and animosities, their nomadic habits, and lack of mental training, they have as a rule shown a total want of that cohesive force necessary to the making up of a nation in the ordinary sense of the word. As they had no established laws, no recognized method of choosing their sovereigns by inheritance or election, no officers with defined powers, their governments in their original state were nothing more than a temporary submission to an intellectual or physical superior, who in some cases ruled with absolute authority, and, in others, was recognized only so long as he was able to dominate the tribe by the qualities which originally enabled him to secure their leadership. In short, the word 'nation' as applied to the uncivilized Indians is so much of a misnomer as to be little more than a compliment."

The Puyallup tribe clearly does not qualify as a "nation" as pointed out by the court in that case, and this argument about the tribe being a sovereign nation is without merit.

The case of *Oklahoma Tax Com. v. United States*, 87 L.Ed. 1612 (1943) involves the right of the state to impose inheritance taxes on the estate of deceased Indians.

The court held that although there are remnants of the form of tribal sovereignty, these Indians have no effective tribal autonomy. They are actually citizens of the state with little to distinguish them from all other citizens.

These Indians as well as the Puyallups, have a state that supplies for them and their children schools, roads, courts, police protection and all the other benefits of an ordered society. Indeed, if need be, they are eligible for welfare as well.

Having accepted the same benefits of other citizens, by becoming citizens and no longer being wards of the government, are they also entitled to retain benefits not afforded to other citizens? This court thinks not. By all

the changes over the years, the tribe has lost its identity as a successor in interest to the treaty, and has accepted equal footing as citizens with no special privileges not available to all.

Our own court, in an early case, decided the status of individual Indians. *State v. Smokalem*, 37 Wash. 91 (1904). The case arose on the question of whether or not the state had jurisdiction in a criminal case over an Indian who committed a crime against the person of another Indian within an Indian reservation. In this case the court said:

> ". . . In 1883 or 1884 the lands on this reservation were allotted to the Indians in severalty, except a small parcel, which is still retained by the government and used for school purposes. On March 3, 1903, all restrictions against the alienation of these allotted lands by the Indians were removed, and the allotted lands are now held by the Indians by the same tenure, and with the same right of alienation, as are the lands of all other citizens of the state. For at least five years prior to the commission of this offense, the Indians residing on this reservation maintained no tribal relations, had no chiefs or head men, maintained no form of Indian government, and had neither laws nor customs. They had abandoned their tribal relations, so far as lay within their power, and had assumed the habits and customs of the whites among whom they dwell. The reservation is divided into school districts and precincts; some, at least, of the Indian children attend the public schools maintained under the general laws of the state; precinct officers, such as justices of the peace and constables, are elected and perform the duties of their offices, in their respective precincts. The Indians are qualified electors of the state, and all their differences are submitted to the courts of the state for adjudication and decision, having no courts of their own. There is no agency at the reservation, and the federal government assumes no jurisdiction whatever over the Indians, except in the simple matter of maintaining the school above referred to."

The case holds that an Indian who has severed his tribal relations and assumed the habits and customs of the whites, is no longer a member of the tribe.

At page 95, the court said:

> ". . . It is not to be supposed that Congress intended that the remnant of a band of Indians, like the Puyallups, without tribal relations, without laws or customs, and without a government to administer them, should be left to prey upon each other and upon society at large, without restraint or fear of punishment from any source, unless they should commit one of the felonies enumerated in this act."

While this case dealt with the status of an individual only, nevertheless it and the other case law, together with the facts showing the change over the past 100 years, leads this court to the conclusion that there is no Puyallup tribe which succeeds in interest to the rights of the original signers of the Treaty of Medicine Creek.

We turn now to the second question: Is there an existing reservation of the Puyallup tribe, and if so, what are its boundaries?

At page 17 of the brief of the defendant *Satiacum*, it is asserted that the Puyallup Indian tribe owns the tidelands abutting on, or appurtenant to their original reservation established by treaty and executive order to "extreme low water." Indeed, it is probably necessary for the defendants to make this assertion, or otherwise they would be trespassing in their pursuit of their fishing activities.

But what about the owners of the lands along the shores of Commencement Bay, and the banks of the Puyallup River? Are the homes, factories, mills, warehouses, parks, et cetera, et cetera, encroaching on the property of the Indians?

The reservation established for the Puyallup Indians covers an area from Pt. Defiance along Commencement Bay, up the Puyallup River for several miles, across it and then along the north side of it, and Commencement Bay to Brown's Point (Pl's Ex. 12; Def's Ex. "00").

Article 6 of the Treaty of Medicine Creek provides:

> "The President may hereafter, when in his opinion the interests of the Territory may require, and the welfare of the said Indians be promoted, remove them from either or all of said reservations to such other suitable place or places within said Territory as he may deem fit, on remunerating them for their improvements and the expenses of their removal, or may consolidate them with other friendly tribes or bands. And he may further, at his discretion, cause the whole or any portion of the lands hereby reserved, or of such other land as may be selected in lieu thereof, to be surveyed into lots, and assign the same to such individuals or families as are willing to avail themselves of the privilege, and will locate on the same as a permanent home, on the same terms and subject to the same regulations as are provided in the sixth article of the treaty with the Omahas, so far as the same may be applicable. Any substantial improvements heretofore made by any Indian, and which he shall be compelled to abandon in consequence of this treaty, shall be valued under the direction of the President, and payment be made accordingly therefor."

In 1887, Congress passed the General Allotment Act (24 Stat. 388), authorizing the division of reservation land among individual Indians with a view towards eventual assimilation into our society.

In 1893, Congress passed the Puyallup Allotment Act (27 Stat. 633) which established a commission to allot the lands of the reservation to the Indians in severalty, and set up a ten-year trust period from the date of passage of the act (March 3, 1893) during which time the allottees would not have the power to alienate their individual tracts.

Some question having been raised as to title when sales were made under this act, Congress in 1904 passed the so-called Cushman Act (33 Stat. 565). This act provides as follows:

> "Be it enacted by the Senate and House of Repre-

sentatives of the United States of America in Congress assembled, That the Act of Congress approved March third, eighteen hundred and ninety-three (Twenty-seven Statutes, page six hundred and thirty-three), authorizing the sale of the Puyallup allotted lands, with restriction upon alienation 'for a period of ten years from the date of the passage' thereof, shall be taken and construed as having expressed the consent of the United States to the removal of restriction upon their sale by said Puyallup Indians to their allotted lands from and after the expiration of said period shall be given effect of having been made without any restrictions upon the power of the allottee to alienate his land.

"Approved, April 28, 1904."

The law seems to be clear, that a reservation cannot be changed or done away with, except by an Act of Congress. The question, therefore, seems to be whether or not the acts of Congress referred to, did, in fact, do away with the reservation when sales were made by Indian allottees.

Mr. Louis J. Burkey, an officer of, and attorney for the Tacoma Title Company, testified concerning a reservation and stated that reference is always made to the fact that certain land is within the Puyallup Indian Reservation and that he knew of no act which removed the existing boundary lines of the reservation. It appears to the court, that his testimony merely indicates that reference to the reservation is made simply as a geographical reference point.

He further testified that in conveyances covering lands within the original reservation boundaries, there are no restrictions or references to any fishing rights. In other words, title is free from any claim of any Indian as to fishing rights, ownership of tidelands, access rights, or any other claim that could be asserted, based upon the Medicine Creek Treaty.

An early case of *United States v. Celestine*, 54 L.Ed. 195 (1909), is relied upon by defendants. This was a

criminal case in which the crime was committed on the Tulalip Indian Reservation.

Although a patent had been issued, the tracts remained within the reservation. The court said:

> "When Congress has once established a reservation, all tracts included within it remain a part of the reservation until separated therefrom by Congress."

However, the treaty with the Tulalip Indians provided for only a *conditional* alienation of the lands, making it clear that the special jurisdiction of the United States had not been taken away.

The defendants also rely on *United States v. Winans*, 49 L.Ed. 1089 (1905). In this case the Indians were given a right in the land—the right of crossing it to the river—the right to occupy it to the extent and for the purposes mentioned.

The case holds that the right secured to the Indians could not be extinguished by the United States or the state in granting patents to land, but says nothing of effect of allotments and sales by Indians.

An early case dealing directly with the question of whether the reservation had been abolished by allotment and sale is *United States v. Kopp*, 110 Fed. 160 (1901), referred to earlier in this opinion. In that case Judge Hanford dismissed a charge against Kopp for selling liquor to a Puyallup Indian. He held that the United States had not proved the vendor to be a Puyallup Indian. The judge said:

> "Since the decision of the Circuit Court of Appeals that case (*Eell v. Ross*, 64 Fed. 417), the conditions have been materially changed by actual sales of a considerable part of the reservation under the provisions of the Act of 1893 above referred to. It is certain that the purchasers from the commissioners appointed pursuant to that statute cannot be lawfully evicted from their property, and *I hold that by the subdivision and alienation of a considerable part of the patented land the reservation has been abolished,*

> *except the part retained as a site for an Indian training school, and use of the government for other purposes.*" (Emphasis supplied)

The same judge in the case of *United States v. Ashton*, 170 Fed. 509 (1909), a quiet title action, said:

> "Every one of those patents extinguished all the rights of the tribe as a community with respect to the tract of land conveyed by it. The fishing rights secured to the Indians by the treaty, were by its express declaration a mere privilege to be enjoyed in common with all citizens and logically antagonistic to any claim of an exclusive or adverse right and entirely lacking in all of the essentials of a grant of an inheritable estate."

By this case, title to the tidelands was quieted in defendant as against any claims of the Indians.

A very recent case is that of *Klamath & Modoc Tribes v. Maison*, 338 F.2d 620 (1964), construing a Termination Act of Congress providing for the termination of Federal supervision over the trust and restricted property of the Klamath Tribe of Indians. The case is important as to the extent of termination of Indians' rights upon termination of a reservation. The court said:

> "We agree that the Termination Act has not expressly dealt with any treaty rights respecting hunting and trapping. It has, however most certainly reduced the area to which these rights attach. By treaty the rights of the Indians were limited to the lands of the reservation. By the Klamath Termination Act, *supra*, it was provided that to the extent necessary to meet the requirements of the Act, lands should be taken from Indian ownership and sold. *Such lands clearly were thereby severed from the reservation and thus released from any restrictions imposed upon them as reservation lands by the treaty.*" (Emphasis supplied)

To the same effect is *State v. Sanapaw*, 21 Wis.2d 377, 124 N.W.2d 41 (1963). The intent of Congress as to the

status of Indians is evidenced by House Concurrent Resolution 108, 83rd session, which states in part:

> "Whereas it is the policy of Congress as rapidly as possible, to make the Indians within the territorial limits of the United States subject to the same laws and entitled to the same privileges and responsibilities as are applicable to other citizens of the United States, and to grant them all of the rights and prerogatives pertaining to American citizenship; and
>
> "Whereas, the Indians within the territorial limits of the United States should assume their full responsibilities as American citizens:. . ."

What is a reservation? It has been defined in the case of *United States v. McGowan*, 82 L.Ed. 410 as follows:

> "An Indian reservation consists of land validly set apart for the use of Indians, under the superintendence of the Government, which retains title to the lands."

In the case at bar, there is neither superintendence or retained title as to the alienated lands.

Our own court has considered this question in *State v. Satiacum*, 50 Wn.2d 513. In that case Judge Donworth said:

> "We are constrained to hold that alienation of the land which was, and is, within the original Puyallup reservation, and which borders upon the Puyallup river, does not alter the character of the right of the Indians to fish upon the river within the exterior boundaries of the original Puyallup Indian reservation, in view of the decision in the *Pioneer Packing Co.* case."

Defendants say that this is a *res judicata* of the question, and if this were so, this court would feel it was bound by this opinion. However, Judge Hill, in that case said that there is no majority opinion. He went on to say:

> ". . . nothing is decided except that the order dismissing the charges against the defendants is affirmed."

This court therefore takes the position that it is not bound by Judge Donworth's statement. It is the opinion of this court that the Puyallup Allotment Act of 1893 (27 Stat. 633) and the Cushman Act of 1904 (33 Stat. 565) in effect abolished the reservation and any fishing rights attached thereto as to any land sold subsequent to the allotment to individual Indians.

By these Acts, Congress evidenced, by the only means possible, its intent to abolish the Puyallup reservation through alienation. All the lands within the original boundaries of the reservation which have been sold are, therefore, no longer a part of the reservation, and all fishing rights claimed as being appurtenant to those lands have been abolished.

Turning now to the third question:

Are the regulations sought to be enforced by the state reasonably necessary for the conservation of fish?

At the outset, the court recognizes that there is a line of cases requiring the state to show that the regulations are "indispensable" in the conservation of fish, and this will be touched on later.

In this case we are dealing with salmon and steelhead fish which are known as anadromous fish. Anadromous fish may generally be defined as fish that are born in fresh water streams, migrate to and live the greater part of their lives in the ocean and, just before dying, return to the place of their birth to spawn.

At the time of the Medicine Creek Treaty, in 1854, the Puyallup Indians were fish and shellfish eaters, and depended largely on them for their subsistence. This was their only need for the fish except for a minor amount of bartering. It is safe to say that present conditions were not contemplated when the treaty was negotiated and signed. As Judge Rosellini said in *State v. Satiacum, supra*:

> "Inherent in the treaty is the implied provision that neither of the contracting parties would destroy the very right and bounty which each ought to share."

While Indians apparently were fishing in the manner sought here to be enjoined, in the years following 1934, it was not until 1953 that any difficulty arose. This was due to the fact that much of the fishing was done at night, and it was not until about 1953 that a regulation required fish buyers to report their purchases as to locations and from whom purchased, thus bringing their commercial sales to the attention of the state.

Fishing was done at night prior to the introduction of monofilament nets which are practically invisible in the water and snare the fish by the gills as they swim into them on their way up the river. Nets used prior to the introduction of this material were visible to the fish and they tended to avoid them, thus making night fishing more effective.

Much evidence was introduced by fish and game protectors, and by fisheries experts of both Washington and Oregon concerning the manner of fishing practiced by the Indians and the need for regulation of fishing.

The waters of Commencement Bay and the Puyallup River are part of the Puyallup Preserve. No commercial fishing is allowed, and sport fishing is, by regulation, confined to hook and line. Evidence shows that the Indians use set nets near the mouth of the Puyallup in Commencement Bay and in the river itself. These nets are as long as over 100 feet and deep enough to practically touch bottom. They are fastened to fixed objects, such as pilings or bridge abutments, and are tended from time to time by being lifted out of the water, and the fish removed. Other nets used in the Puyallup River are drift nets that extend from one side of the river to the other, and are allowed to drift downstream, snaring fish in their webbing as they go. The fish caught are used personally, but a large number are sold commercially.

The complaint of the state is that this method of fishing is against state regulations and has the effect of depleting or ruining the salmon runs.

As has been pointed out, originally the Indians only took enough fish for personal use and barter, which was inconsequential compared to the present demand for fish.

In order to maintain the run of fish, it is necessary to keep a proper balance of returning fish to the spawning grounds. Evidence indicated that there have been less and less returning fish from 1952 to 1964. The return went up sharply in 1964 because net fishing was curtailed at the mouth of the Puyallup River by a court injunction. The evidence indicates, however, that the Indian catch of salmon and steelhead is only about 3 to 5 per cent of the total.

It is argued by the defendants that commercial and sport fishing should be curtailed more, and that pollution in the streams, dams and dredging of the river, et cetera, cause the killing and depletion of fish runs, and not Indian fishing. The state argues, however, that all segments of the fishery must be regulated, and that pollution, dams, et cetera, are also regulated and taken into consideration in the over-all conservation program.

Fish swimming freely in the waters are not owned by anyone. Title is obtained when possession is obtained. We are here dealing, however, with a natural resource made available through the rivers and streams, and the right to regulate the fishing thus made available, and of thereby obtaining title to or ownership of the fish.

If the state has the right to regulate, the courts have adopted different rules as to what regulations may be adopted in order to preserve fish runs. *Makah Indian Tribe v. Schoettler,* 192 F.2d 224 (1951).

The defendants rely upon the case of *Maison v. Umatilla,* 314 F.2d 169 (1963), and contend that this court should adopt that rule. That case held that it is necessary for the state to show that the regulation sought to be imposed is "indispensable" to the accomplishment of the needed limitation. This court rejects this rule as being too strict, and imposes a burden on the state which is impossible to meet.

The case of *Tulee v. Washington,* 86 L.Ed. 1115 (1942) was one where Tulee was charged with fishing without a license. It was held that the state has power to regulate the manner of fishing to conserve fish, but

can't charge a license fee. This case is also authority for the proposition that the treaty did not give the Indians the right to fish unrestricted and free of any state regulation.

The conclusive case on this question so far as the state of Washington is concerned, is *State v. McCoy*, 63 Wn. 2d 421-(1963). Here, the defendant was fishing in much the same manner as were the defendants in the case at bar. At page 427, the court said:

> "One essential of a conservation program is the regulation of the harvest of salmon in salt and fresh water areas. It is regulation that provides the escapement necessary to maintain a perpetual supply of salmon for the harvest by all people. If a fishery, within a river or off its mouth, harvests too many of the adult salmon because of the shallow confined nature of the fishing area and the habits of the salmon which cause them to school up and delay in these areas prior to ascending the river, there will be little escapement to perpetuate the runs. An uncontrolled fishery in such areas may harvest almost the entire run of a fishery resource. Salmon are not inexhaustible and without their proper escapement for reproduction from year to year through controls in the harvest, the stocks will be reduced to a point where only a remnant run will exist."

This language applies with equal force to the situation sought to be regulated in the case at bar. The case holds that the state has the power and the right to subject Indians to reasonable and necessary regulations for the protection of the fishing resource.

Without reviewing the evidence in this case, it is clear to the court that a large number of fish must survive back to spawning grounds regardless of pollution, predators, logging, dams, et cetera, and Indian net fishing prevents such survival. It is necessary to prohibit all non-sport fishing in Commencement Bay and the Puyallup River in order to conserve the fish. While there no doubt is pollution and other man-made activities on the river that do adversely affect the fish, these in themselves

are not lethal, and any regulations covering any phase of fish protection are in vain unless the state also controls fishing in Commencement Bay and the Puyallup River.

Indians' unregulated gill net fishery in the Puyallup River has caused serious damage to the fish runs indigenous to that stream, and will, if permitted to continue, cause irreparable harm in that the fishery resource will be unable to sustain itself, in accordance with the basic principles of conservation. It follows that the regulations sought to be imposed by the state prohibiting net fishing in Commencement Bay and the Puyallup River are reasonably necessary for the preservation of salmon and steelhead fish.

From the answers to the questions in this case, the court concludes that the defendants are not entitled to any privileges or immunities from the application of state conservation measures, and that a permanent injunction may issue enjoining the defendants from netting anadromous fish in Commencement Bay, the Puyallup River, or any of its tributaries.

DATED at Tacoma, Washington, this 27th day of May, 1965.

JOHN D. COCHRAN, *Judge*

WASHINGTON STATE SUPREME COURT DECISION

[No. 38611. En Banc. January 12, 1967.]

THE DEPARTMENT OF GAME *et al.*, *Respondents*, *v.* THE PUYALLUP TRIBE, INC., *et al.*, *Appellants*.

(1) **Judgment—Declaratory Judgment—Appropriate Controversies—Interpretation of Treaty Rights.** An action for a declaratory judgment under R.C.W. 7.24 was a proper method for certain state agencies to obtain a determination of whether certain Indians were immune from state fishing regulations by virtue of treaties between the United States and various Indian tribes, where the alternative method of obtaining relief would be a multiplicity of arrests for violation of the fishing regulations, and the jailing and detention of individuals for considerable

periods of time with consequent hardship to them and their families.

(2) **States — Indians — Treaties — Repudiation.** The courts of this state do not have the power to repudiate and nullify treaties between Indian tribes and the United States.

(3) **Same — Indians — Termination of Tribe.** The courts of this state do not have jurisdiction to make a judicial determination of the termination of existence of an Indian tribe, but such a tribe continues to exist so long as it is recognized as such by appropriate agencies of the United States or until Congress passes a termination act.

(4) **Fish — Indians — Off-reservation Fishing — Disposal of Reservation.** The rights of individual Indians, under the Treaty of Medicine Creek, to fish at usual and accustomed grounds and stations, is not dependent upon any rights in reservation lands, and the off-reservation fishing rights are unimpaired by the fact that reservation lands have, pursuant to act of Congress, passed into fee simple private ownership.

(5) **Same — Indians — Off-reservation Fishing — Regulation by State.** Indian treaty rights to fish at all usual and accustomed grounds and stations do not extend to permit fishing in such a manner as would destroy the fishery, but leave the states with power to impose such regulatory restrictions as are necessary for the conservation of fish. When a person charged with violation of state conservation regulations has established that he is a member of an Indian tribe having a treaty right to fish at all "usual and accustomed grounds and stations," the burden is upon the state to show that its regulations are reasonable and necessary to conserve the fishery.

(6) **Same —Indians — Off-reservation Fishing — State Conservation Rules — Validity.** Insofar as Indian treaty rights to fish at all usual and accustomed grounds and stations are concerned, the test

to be appled in passing upon the propriety and validity of state regulatory restrictions is not whether they are "indispensable" to the preservation and protection of the fishery involved, but whether they are "reasonable and necessary" for that purpose.

HUNTER, HALE, and ROSELLINI, JJ., dissent. DONWORTH, J., dissents in part.

Appeal from a judgment of the Superior Court for Pierce County, No. 158069, John D. Cochran, J., entered August 13, 1965. *Reversed in part.*

Action for a declaratory judgment. Defendants appeal from a judgment in favor of the plaintiffs.

Arthur R. Knodel and *Malcolm S. McLeod* for appellants.

The *Attorney General* and *Joseph L. Coniff, Assistant,* for respondents.

HILL, J.—The Department of Game of the State of Washington and the Department of Fisheries of the State of Washington, hereinafter called the Departments, brought this declaratory judgment action[1] for the purpose of determining whether certain named individuals had, as members of the Puyallup Indian Tribe, any privileges or immunities from the application of state conservation measures.

The defendants asserted rights under Article 3 of the Treaty of Medicine Creek (10 Stat. 1132) between the United States and various Indian tribes including the Puyallups. This treaty was signed December 26, 1854; ratified by the United States Senate March 3, 1855, and proclaimed by the President of the United States April 10, 1855. This treaty was the first of a group of 11 treaties negotiated with the Indian Tribes of the Pacific

1. The case caption is erroneous, there being no entity known as "The Puyallup Tribe, Inc., a corporation." The Puyallup Tribe of Indians did appear and answer by and through the chairman of the Tribal Council.

Northwest between December 26, 1854 and July 16, 1855.

By the treaty, the Puyallup Indians ceded, relinquished and conveyed to the United States "all their right, title, and interest in and to the lands and country occupied by them," in return for which they received a reservation and certain rights, including those named in article 3 which reads:

> The right of taking fish, at all usual and accustomed grounds and stations, is further secured to said Indians, in common with all citizens of the Territory,[2] and of erecting temporary houses for the purpose of curing, together with the privilege of hunting, gathering roots and berries, and pasturing their horses on open and unclaimed lands: *Provided, however,* That they shall not take shell fish from any beds staked or cultivated by citizens, and that they shall alter all stallions not intended for breeding horses, and shall keep up and confine the latter.

The trial court concluded that the Puyallup Tribe no longer existed as an entity and that its members no longer had any rights under the treaty; that there was no longer any Puyallup Indian Reservation and, hence, that the Puyallup Indians had no fishing rights within what had been the reservation; and that

> It is reasonable and necessary that state conservation, rules and regulations be uniformly applied to all citizens on an equal basis. (Finding No. 4)

Consequently, the trial court permanently enjoined the defendants and all members of the "Puyallup Tribe" from fishing in the Puyallup River watershed and Commencement Bay in any manner contrary to the laws of the State of Washington, or contrary to the rules and regulations of the Departments.

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2. Each of the treaties with the Indians in Washington Territory preserved to the Indians the right to take fish exclusively in the reservations and at all usual and accustomed places (or, as in the treaty with which we are here concerned, "at all usual and accustomed grounds and stations"), in common with citizens of the Territory, or variably in common with citizens of the United States.

From that judgment, the Puyallup Indian Tribal Council appeals.

It is first urged that the state Departments are not entitled to seek relief under the Uniform Declaratory Judgments Act (R.C.W. 7.24.010 *et seq.*). Basically, the contention is that the issues here before us for determination should be raised in individual criminal actions brought against Indians who violate the food fish and game fish conservation laws found in Titles 75 and 77 R.C.W., or the regulations promulgated thereunder.

[1] A multiplicity of arrests for violation of fishing regulations, which involve the jailing and detention for considerable periods of individuals and consequent hardship to them and their families, seems to us the unnecessarily hard way of determining whether they have immunity from certain fishing regulations.

Since the Indians who claim immunity from these regulations claim them under treaties between the United States and various Indian tribes, it seems to us that the state Departments acted wisely in seeking an interpretation of those treaties and a delineation of the rights of the members of the different tribes in a series of actions under the Uniform Declaratory Judgments Act.

On the merits, both parties assume an extreme and adamant position.

The Departments take the position that the Indians never had, as against the United States, any right to the "use and occupancy" of any land; that they were and are a conquered people without right or title to anything. Having nothing to cede, there was no consideration for any promises made to them, and there is no necessity to respect those promises even though they were labeled "treaties."

[2] Our answer[3] is that regardless of whether treaties with Indian tribes were necessary, they were deemed de-

3. A much more detailed and completely devastating answer is given by the Supreme Court of the United States in *United States v. Alcea Band of Tillamooks*, 329 U.S. 40, 55, 91 L.Ed. 29, 67 Sup. Ct. 167 (1946). Even the dissent in that case, while disagreeing with the view

sirable by the United States and those entered into by it cannot be repudiated by this state or its courts.

The case of *Tee-Hit-Ton Indians v. United States*, 348 U.S. 272, 273, 99 L.Ed. 314, 317, 75 Sup. Ct. 313, 314 (1955), on which the Departments rely, points out specifically that there were no treaty rights involved and says:

> This is not a case that is connected with any phase of the policy of the Congress, continued throughout our history, to extinguish Indian title through negotiation rather than by force. . . .

Nor is there anything in *Village of Kake v. Egan*, 369 U.S. 60, 72, 7 L.Ed.2d 573, 581, 82 Sup. Ct. 562, 569 (1962), also relied upon by the Departments, which contains any suggestion that the United States is now about to allow a state to repudiate any treaty which the United States has made. The opinion does point out that,

> In 1871 the power to make treaties with Indian tribes was abolished, 16 Stat. 544, 566, 25 U.S.C. § 71.

and that there were no treaties with Alaska Indians. It should also have pointed out that the same enactment provided that "no obligation of any treaty lawfully made and ratified" with an Indian tribe prior to March 3, 1871, was "invalidated or impaired." The opinion does not directly or by inference imply that the United States was just playing "Treaty" with the Indians when the Senate ratified and the President proclaimed the treaty here in

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of the majority opinion as to Indian rights and title in the aboriginal lands "when there has been no prior recognition by the United States through treaty or statute of any title or legal or equitable right of the Indians in the land," does not suggest the abrogation of the treaties which have been ratified.

We commend, too, as an answer to the "hard-boiled" argument of the Departments, the article on "Original Indian Title" in "The Legal Conscience," a volume of the selected papers of Felix S. Cohen (pp. 273-303), in which he points out that the *Tillamooks* case, *supra*,

> ". . . gives the final coup de grace to what has been called the 'menagerie' theory of Indian title, the theory that Indians are less than human and that their relation to their lands is not the human relation of ownership but rather something similar to the relation that animals bear to the areas in which they may be temporarily confined. . . ."

question. It was not the Indians, but the United States and the white settlers in the Territory of Washington who were asking for this and other treaties in 1854 and 1855.

The Departments further urge that if the Puyallup Indians ever had any fishing rights as such, their rights in the reservation area long ago ceased to exist; that the members of the Puyallup Tribe are all citizens of the United States and of the State of Washington and have no rights different from any other citizen.

The defendants, on the other hand, urge that they have rights under the Medicine Creek Treaty to fish on the reservation and at other "usual and accustomed grounds and stations" at any time and with any type of gear they choose and that they do not have to comply with any regulation, or if they have to recognize any regulation it must be "indispensable" to the preservation of the fishery. (This last position is posited on *Maison v. Confederated Tribes of the Umatilla Indian Reservation*, 314 F.2d 169 (9th Cir. 1963), which will be discussed later in this opinion.)

The observation of Mr. Justice Black in *Tulee v. Washington*, 315 U.S. 681, 684, 86 L.Ed. 1115, 1119, 62 Sup. Ct. 862, 864 (1941), is still apropos:

> We think the state's construction of the treaty is too narrow and the appellant's too broad; . . .

The members of the tribes signatory to the various treaties do have certain special fishing rights thereunder, notwithstanding the contention of the state. And the members of such tribes are subject at least to regulations which are necessary for the preservation of the fishery, notwithstanding their contentions to the contrary.

We will now consider whether the trial court erred in reaching the conclusion:

> There is no presently existing Puyallup Tribe of Indians which succeeds in interest to the original Puyallup Indian Tribe which was signatory to the Treaty of Medicine Creek (Conclusion of Law No. 1).

To support this conclusion, the trial court made findings Nos. 10 and 11.

> While some of the defendants have participated in the affairs of a federally organized group known as the "Puyallup Tribe," this organization is in essence no different than the Italian-American Club or the Sons and Daughters of Norway, or like social groups. Over the years, the defendants have blended themselves into the dominant Western-European society to such an extent that they are indistinguishable from all other citizens of this state except for the fact that in some instances individuals may be able to trace their blood line ancestry to a member of the aboriginal tribe of Puyallup Indians. The activities of the defendants, insofar as they are related to the federal organization known as the "Puyallup Tribe," have been limited to considering problems with regard to membership, operation of cemetary [*sic*], the disposition of certain trust funds remaining on deposit for their benefit in the Treasury of the United States and the present assertion of their claimed immunities from state conservation measures.
>
> The federal organization known as the "Puyallup Tribe" maintains no courts, has no policemen, and occupies no given land area. In fact, the lands over which the defendants assert exclusive jurisdiction now comprise an integral part of the City of Tacoma (Finding No. 10).
>
> In 1929 the United States Government established a membership list of the then living descendants of the aboriginal tribe of Puyallup Indians. Blood line descendancy was not required to have an individual's name appear on the roll. The 1929 roll was prepared for the purpose of distributing certain funds resulting from the sale of the few remaining trust lands still held for the benefit of the aboriginal Puyallup Tribe of Indians by the United States Government. This roll is now out of date, and although some efforts have been made to make it current, these efforts have not yet been successful. This court is unable to determine who is, or is not, a member of the federal

organization known as the "Puyallup Tribe" at this time (Finding No. 11).

[3] We are satisfied that so long as the United States government, through its appropriate agencies, continues to recognize the existence of the Puyallup Tribe of Indians and its tribal roll, as they clearly do, the Superior Court for Pierce County acted without jurisdiction in making a judicial determination of the tribe's termination.

Historically and uniformally the termination of federal supervision of an Indian tribe has been accomplished by the Congress through enactment of legislation.[4] And even the Supreme Court of the United States defers to the executive and other political departments of government "whose more special duty it is to determine such affairs" stating that "If by them those Indians are recognized as a tribe, this court must do the same." (*United States v. Sandoval*, 231 U.S. 28, 47, 58 L.Ed. 107, 114, 34 Sup. Ct. 1, 6. (1913)).

The trial court's "Memorandum Decision" is a very able and scholarly document, and while we have disagreed on this phase of the case, we are persuaded by its presentation that the time is long past when there should be a supercitizenship on the part of those proudly claiming Puyallup-tribe ancestry which entitles them to disobey laws and regulations imposed for the conservation of a great natural resource, which all other citizens must obey. However, it is a supercitizenship conferred by treaty, and only the United States can remove the discrimination.

The trial court also found:

> All of the lands within the exterior boundaries of the old Puyallup Indian Reservation were sold, in fee simple absolute, pursuant to an act of Congress (33 Stat. 565) with the exception of two small

4. For examples of such legislation see: Termination of the Klamath Tribe, 25 U.S.C.A. § 564; Termination of Wyandotte Tribe of Oklahoma, 25 U.S.C.A. §§ 791-807; Termination of the Peoria Tribe of Oklahoma, 25 U.S.C.A. §§ 821-826; Termination of the Ottawa Tribe of Oklahoma, 25 U.S.C.A. §§ 841-853; Termination of Menominee Tribe of Wisconsin, 25 U.S.C.A. §§ 891-902; and Termination of the Ponca Tribe of Nebraska, 25 U.S.C.A. §§ 971-980.

> tracts which are presently being utilized as a cemetery for members of the federal organization known as the "Puyallup Tribe." The total acreage remaining in trust status is approximately 22 acres. The original reservation was in excess of 18,000 acres. (Finding No. 12)

The evidence supports this finding, and it is clear that though the Puyallup Tribe continues to exist, the entire reservation, except for the small tract to which reference was made, has passed into fee simple private ownership, consequent to congressional action, and that there is no longer a reservation.

Some questions having arisen concerning the power of the Indian allottees to convey complete fee simple title to their allotted lands, Congress confirmed the removal of the trust restrictions against alienation of the allotted lands. 33 Stat. 565 (1904).

> *Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,* That the Act of Congress approved March third, eighteen hundred and ninety-three (Twenty-seventh Statutes, page six hundred and thirty-three), authorizing the sale of the Puyallup allotted lands, with restriction upon alienation "for a period of ten years from the date of the passage" thereof, shall be taken and construed as having expressed the consent of the United States to the removal of restriction upon alienation by said Puyallup Indians to their allotted lands from and after the expiration of said period shall be given effect of having been made without any restrictions upon the power of the allottee to alienate his land.

Conclusive evidence of congressional intent is shown by the House Committee's Report on this bill:

> This bill (H.R. 5767) is designed to give the consent of Congress to the removal of the restrictions heretofore placed on the sale of Puyallup allotted lands, and to permit said allottees to lease, encumber, grant, alien, sell and convey said lands as freely

> as any other person may sell and convey real estate. (H.R. Rep. No. 301, 58th Cong., 2d Sess. (1904))

Attached to the report, as an exhibit, was a letter from the Commissioner of Indian Affairs expressing the view that,

> Should it become a law, it would certainly be clear to all concerned that the Government thereby gives its absolute, full, and complete consent to the removal of the restrictions mentioned.

There can be no question but that the legislation, as enacted, carried out the legislative intent.

Whether the land within the reservation remains in the possession of the original allottees, or whether it has passed into non-Indian hands, the result is the same, so far as the tribe is concerned: It has no legal interest in it. All of the land may be taxed by the state (except possibly the small tract reserved for cemetery purposes). *Goudy v. Meath*, 38 Wash. 126, 80 Pac. 295 (1905).

[4] While reservation lands are allotted and sold pursuant to an Act of Congress removing all restrictions upon alienation, there is no implied reservation of hunting and fishing rights. *United States ex rel. Marks v. Brooks*, 32 F. supp. 422 (1940), citing *Pennock v. Commissioners*, 103 U.S. 44, 48, 26 L.Ed. 367 (1881), and *Spalding v. Chandler*, 160 U.S. 394, 407, 40 L.Ed. 469, 16 Sup. Ct. 360 (1896).

The fishing rights of members of the Puyallup Tribe rest not upon any rights in the reservation lands, because these have been surrendered pursuant to the congressional action to which we have referred, but upon their "right of taking fish, at all usual and accustomed grounds and stations, . . . in common with all citizens of the Territory," derived from the Medicine Creek Treaty. We are well aware of the statement in *United States v. Winans*, 198 U.S. 371, 49 L.Ed. 1089, 25 Sup. Ct. 662 (1905), quoted in *Seufert Bros. Co. v. United States*, 249 U.S. 194, 198, 63 L.Ed. 555, 558, 39 Sup. Ct. 203 (1919):

> "We will construe a treaty with the Indians as 'that unlettered people' understood it, and 'as justice and reason demand in all cases where power is exerted by the strong over those to whom they owe care and protecton,' and counterpoise the inequality 'by the superiour justice which looks only to the substance of the right without regard to technical rules.' 119 U.S. 1; 175 U.S. 1."

[5] We would protect these treaty rights as readily and effectively as they have been protected in *Winans, supra, Seufert Bros. Co., supra,* and *United States v. Brookfield Fisheries,* 24 F. Supp. 712 (D.C. Ore. 1938), but such rights are not absolute; they do not extend to the right to fish with such gear and at such times as would destroy the fishery. The United States Supreme Court, in *Tulee v. Washington, supra,* said:

> [T]he treaty leaves the state with power to impose on Indians, equally with others, such restrictions of a purely regulatory nature concerning the time and manner of fishing outside the reservation as are necessary for the conservation of fish, it forecloses the state from charging the Indians a fee of the kind in question here. (Footnote omitted.) (p. 684)

Consistent with this statement by the Supreme Court, this court and the Ninth Circuit Court of Appeals have passed on the regulations imposed by the Departments with an eye to determining whether the regulations concerning the manner and time of fishing then in question were necessary to the conservation of the fishery and, hence, could be enforced against Indians whose rights to fish at their usual and accustomed grounds and stations were preserved to them by treaties similar to the one before the court in the *Tulee* case.

McCauley v. Makah Indian Tribe, 128 F.2d 867, 870 (9th Cir. 1942), was tried in the district court before the decision in *Tulee* was handed down, but heard in the circuit court following that decison. The district court had entered a sweeping injunction against the enforcement of regulations interfering with the Makah Indians fishing

in the Hoko River. The case was reversed with the closing comment.

> The case seems to have been tried by both parties on the theory that the Indians had either all fishing rights on the Hoko River or only those of non-Indian citizens. It well may be that the Tulee case has decided all that the parties are seeking to determine regarding the Makah treaty provision. However, in reversing it is with permission to the appellees to amend their complaint and present the issue of their right to such claimed allowable methods of fishing, specifically described, and not by such a general term as "other Indian fishing gear," as they may be advised.

In *Makah Indian Tribe v. Schoettler*, 192 F.2d 224, 226 (9th Cir. 1951), again the Makah Indians sought an injunction against enforcement of certain regulations, and the district court dismissed the action; the Makahs appealed. The circuit court—citing the *Tulee* case, *supra*, and *Seufert Bros. Co. v. United States*, *supra*, and *United States v. Winans*, *supra*—summarily disposed of the contention which is also made here by the Departments, that the Indians had no rights against state interference which do not exist for other citizens. It quoted with approval *Tulee*, *supra*, concerning such restrictions of a purely regulatory nature relative to the time and manner of fishing outside the reservation as are necessary for the conservation of fish and then said:

> We are not here concerned, as we were in *McCauley v. Makah Indian tribe*, 9 Cir., 128 F.2d 867, with any particular form of regulation. We do not question the right to enact regulations which will permit fishing in the Hoko River to the extent that will give the Makahs their treaty right to fish there without depletion of the fall run of salmon. We hold no more than that the appellee has not sustained its burden of proof that the instant regulations preventing the Makahs from the taking of fish in the Hoko are "necessary for the conservation of fish" in the fall run of salmon in that river.

The decision of the district court is reversed and that court ordered to make and enter an order restraining the appellee from enforcing such regulations.

In *State v. McCoy*, 63 Wn.2d 421, 387 P.2d 942 (1963), we upheld a 10-day closure of all fishing on the Skagit River, designed to protect the peak of the salmon run passing through that river to the spawning grounds,[5] on the basis that the regulation was necessary to conserve chinook salmon runs in the Skagit River. In that case, McCoy, a member of the Swinomish Tribe, was arrested for fishing near the mouth of the north fork of the Skagit River. He was operating an 18-foot, 25-hp-outboard-motor boat and using a 600-foot modern nylon gill net. The superior court found that he was not fishing on the reservation, but was fishing at "usual and accustomed grounds" and acquitted him, holding that his rights under the Treaty of Point Elliott (12 Stat. 927; January 22, 1855) gave him immunity to closure regulations. We reversed the judgment and sent the case back for a new trial, directing that the court determine whether the regulation violated was necessary to conserve the fishery.

We agree with the trial court that the rule of the *McCoy* case, *supra*, is the proper one to be applied where treaty rights and state conservation regulations are in apparent conflict. The burden of proof, once the defendant has established that he is a member of a tribe having a treaty right to take fish at all "usual and accustomed grounds and stations," is on the state to show that its regulations, which limit Indian fishing rights either as to the time or manner of fishing, are reasonable and necessary to conserve the fishery.

[6] The United States did not hesitate to adopt regulations it regarded as necessary to preserve the halibut fishery. The Makah Tribe sued to recover damages for alleged deprivation of the fishing rights reserved to them under article 4 of their 1855 treaty (12 Stat. 1939) with

5. For a better understanding of the necessity of conservation regulations to conserve the salmon runs, see the opinion in the *McCoy* case, *supra*, and Judge Finley's concurring opinion in *State v. Satiacum*, 50 Wn.2d 535, *et seq.*, 314 P.2d 400 *et seq.* (1957).

the United States. The Court of Claims held that the government's regulations restricting the rights of the Makahs to fish for halibut did not amount to a breach of the treaty. *Makah Indian Tribe v. United States*, 7 Ind. Cl. Comm. 477 (1959); affirmed 151 Ct. Cl. Rep. 701 (1960); *cert. denied* 365 U.S. 879, 6 L. Ed.2d 191, 81 Sup. Ct. 1028 (1961).

The appellants have seized upon certain language in the recent case of *Maison v. Confederated Tribes of the Umatilla Indian Reservation, supra*, as establishing the rule that the particular regulation sought to be imposed by the state must be shown to be "indispensable" to the preservation and protection of the fishery sought to be regulated before it can be enforced against Indians claiming treaty rights to fish at "usual and accustomed grounds and stations."

The word "indispensable" is taken from *Tulee v. Washington, supra*, where the Supreme Court of the United States struck down a requirement for a fishing license as applied to treaty Indians.

> Viewing the treaty in this light, we are of the opinion that the state is without power to charge the Yakimas a fee for fishing. A stated purpose of the licensing act was to provide for "the support of the state government and its existing public institutions." Laws of Washington (1937) 529, 534. The license fees prescribed are regulatory as well as revenue producing. But it is clear that their regulatory purpose could be accomplished otherwise, that the imposition of license fees is not *indispensable to the effectiveness of a state conservation program*. Even though this method may be both convenient and, in its general impact, fair, it acts upon the Indians as a charge for exercising the very right their ancestors intended to reserve. We believe that such exaction of fees as a prerequisite to the enjoyment of fishing in the "usual and accustomed places" cannot be reconciled with a fair construction of the treaty. (Italics ours)

It was the exaction of a fee for fishing which could not be reconciled with a fair construction of the treaty.

All would agree that the imposition of license fees is not indispensable to the effectiveness of a state conservation program, but such a holding is not supporting authority for the proposition that any regulation that the state adopts must be indispensable to the success of its conservation program before that regulation is applicable to treaty Indians. We are convinced that the Supreme Court did not set up such an impossible standard in *Tulee*, nor did it intend to. The real holding in that case is

> [T]hat, while the treaty leaves the state with power to impose on Indians, equally with others, such restrictions of a purely regulatory nature concerning the time and manner of fishing outside the reservation as are necessary for the conservation of fish, it forecloses the state from charging the Indians a fee of the kind in question here. (Footnote omitted.) (p. 684)

Tulee and other Supreme Court decisions recognize that the state must have the necessary power of appropriate regulation to preserve a resource for the benefit of all of the people of the state. *New York ex rel. Kennedy v. Becker*, 241 U.S. 556, 60 L. Ed. 1166, 36 Sup. Ct. 705 (1916); *United States v. Winans, supra.*

We are convinced that the three judges of the 9th Circuit Court of Appeals, who decided the *Maison* case, *supra*, read too much into the Supreme Court's use of the word "indispensable" in the *Tulee* case and have created therefrom a completely unworkable standard for determining what regulations relative to the time and manner of fishing outside the reservation may be imposed on Indians claiming treaty rights.

It would make the competent exercise of the state's inherent power of preservation an impossibility. In *New York ex rel. Kennedy v. Becker, supra*, the United States Supreme Court discussed the reserved rights of the Seneca Indians to fish in the waters on land ceded by them to Robert Morris by the treaty of the "Big Tree" of September 15, 1797[6] (7 Stat. 601). Mr. Justice Hughes,

6. Ratified by the Senate on April 11, 1798, and proclaimed by the President.

in an opinion adopted by the court after his resignation in 1916, said:

> It is said that the State would regulate the whites and that the Indian tribe would regulate its members, but if neither could exercise authority with respect to the other at the *locus in quo*, either would be free to destroy the subject of the power. Such a duality of sovereignty instead of maintaining in each the essential power of preservation would in fact deny it to both.
>
> It has frequently been said that treaties with the Indians should be construed in the sense in which the Indians understood them. But it is idle to suppose that there was any actual anticipation at the time the treaty was made of the conditions now existing to which the legislation in question was addressed. Adopted when game was plentiful—when the cultivation contemplated by the whites was not expected to interfere with its abundance—it can hardly be supposed that the thought of the Indians was concerned with the necessary exercise of inherent power under modern conditions for the preservation of wild life. But the existence of the sovereignty of the State was well understood, and this conception involved all that was necessarily implied in that sovereignty, whether fully appreciated or not. We do not think that it is a proper construction of the reservation in the conveyance to regard it as an attempt either to reserve sovereign prerogative or so to divide the inherent power of preservation as to make its competent exercise impossible. Rather are we of the opinion that the clause is fully satisfied by considering it a reservation of a privilege of fishing and hunting upon the granted lands in common with the grantees, and others to whom the privilege might be extended, but subject nevertheless to that necessary power of appropriate regulation, as to all those privileged, which inhered in the sovereignty of the State over the lands where the privilege was exercised. This was clearly recognized in *United States v. Winans*, 198 U.S. 371, 384, where the court in sustaining the fishing rights of the Indians on the Columbia River, under the provisions of the treaty between the United States and the Yakima Indians, ratified in 1859, said (referring

to the authority of the State of Washington): "Nor does it" (that is, the right of 'taking fish at all usual and accustomed places') "restrain the State unreasonably, if at all, in the regulation of the right. It only fixes in the land such easements as enable the right to be exercised." (pp. 563, 564)

Attention is particularly directed to the quotation from *United States v. Winans, supra,* at the end of the foregoing quotation.

In summary: We have rejected the Departments' argument that the Indian treaties are of no force and effect and that the state may repudiate them at will.

We have ruled that the trial court had no jurisdiction to determine whether or not there had been a termination of the Puyallup Indian Tribe, and that the tribe continues to exist, at least so long as it is recognized as such by the appropriate agencies of the United States, or until Congress passes a termination act.

We have agreed with the trial court that there is no longer a Puyallup Indian Reservation, and that the Puyallup Indians no longer have any special or treaty rights to fish thereon because it was once a reservation; however, we hold that they continue to have a right to fish at usual and accustomed grounds and stations and that any regulations of the Departments limiting or restricting those rights must be reasonable and necessary for the preservation of the fishery.

The state has clearly met that test, at least to the extent that it has established that continued use by the defendants of their drift nets and set nets would result in the nearly complete destruction of the anadromous fish runs in the Puyallup River and that a regulation prohibiting the use of such nets was necessary for the preservation of the fishery.

We are, therefore, in accord with the conclusion of the trial court that an injunction should be entered in this case; however, the injunction entered by the trial court is much too broad. It permanently enjoins individual de-

fendants and members of the federal organization known as the "Puyallup Tribe" from fishing in the Puyallup River watershed and Commencement Bay in any manner that is contrary to the rules and regulations of the Department of Fisheries of the State of Washington and the Department of Game of the State of Washington. It is predicated on the trial court's determination that the defendants have no treaty rights.

The cause must be remanded to the trial court for the entry of a judgment and decree predicated upon the proposition that the defendants do have treaty rights, but that they are subject to conservation regulations which are reasonable and necessary to preserve the fishery.

The essence of this opinion is—and the decree, as reframed, should so reflect: (1) If a defendant proves that he is a member of the Puyallup Tribe; and (2) He is fishing at one of the usual and accustomed fishing places of that tribe; (3) He cannot be restrained or enjoined from doing so, unless he is violating a statute, or regulation of the Departments promulgated thereunder, which has been established to be reasonable and necessary for the conservation of the fishery.

The injunction should be tailored to the particular situation. A specific act or acts should be enjoined on the basis that there has been a violation of a statute or statutes, or a regulation or regulations promulgated thereunder, and that such regulation or regulations are reasonable and necessary for the preservation of the fishery. The findings, conclusions, and judgment in this case should be rewritten to show clearly the basis and the extent of the injunction.

The judgment and decree appealed from is set aside, and the cause is remanded for the purposes indicated in this opinion.

Neither the appellants nor the respondents having prevailed to the full extent of their claims, each will bear its own costs on this appeal.

FINLEY, C. J., WEAVER, and HAMILTON, J. J., and LANGENBACH, J. Pro Tem., concur.

DONWORTH, J. (concurring in part and dissenting in part)—I concur in the result reached in the majority opinion in so far as it holds that appellants in this case do have treaty rights and have standing to assert those rights in this suit, but I do not agree that the test of their right to fish is dependent on the existence or nonexistence of a state statute or regulation which has been held by the trial court to be reasonable and necessary for the conservation of fish.

I would reverse the trial court's degree of permanent injunction with directions to dismiss the action for any one or all of the three reasons stated below.

I.

I am of the opinion that:

(1) The provisions of article 3 of the Treaty of Medicine Creek are presently the supreme law of the land and are superior to the exercise of the state's police power respecting the regulation of fishing by Indians at places where the treaty is applicable.

(2) If the Secretary of the Interior and the Commissioner of Indian Affairs have adopted the proposed rules relating to off-reservation fishing by treaty Indians, the Federal Government has assumed control of the matters in controversy in this case, and state courts may not enjoin appellants from fishing in the Puyallup River. See 30 Fed. Reg. 8969.

(3) Assuming, arguendo, that the trial court had power to enjoin such fishing, the findings of fact do not support the conclusions of law or the permanent injunction entered by it. In my opinion, this statement is correct regardless of whether the "indispensable" test or the "reasonable and necessary" test be applied.

My views on the rights of treaty Indians to fish "at all usual and accustomed grounds and stations" are stated at some length in the first opinion (signed by four judges)

in *State v. Satiacum*, 50 Wn.2d 513, 314 P.2d 400 (1957), and in my dissenting opinion in *State v. McCoy*, 63 Wn.2d 421, 387 P.2d 942 (1963). See the decisions of the courts of last resort quoted and discussed therein.

In the interest of brevity, I incorporate those two opinions herein by reference as a part of this opinion. In those opinions, it was stated that, under the federal constitution, the treaty was the supreme law of the land and would continue to be until:

> (1) the treaty is modified or abrogated by act of Congress, or
>
> (2) the treaty is voluntarily abandoned by the Puyallup tribe, or
>
> (3) the supreme court of the United States reverses or modifies our decision in this case. (at 529)

In the last 9 years since the two *Satiacum* decisions were filed none of these events have taken place. Nor have respondents sought a final solution of the problem through any branch of the United States Government—legislative, executive, or the Supreme Court.

II.

In the case at bar, the United States has for the first time appeared in this court and filed a brief as amicus curiae. Its counsel participated in the oral argument.

The United States contends in its brief that the trial court's permanent injunction fails to give *any* recognition to the rights secured to the Indians by article 3 of the Treaty of Medicine Creek. After citing cases relating to this contention, the government's brief states:

> . . . It is enough at this point to note that the permanent injunction against fishing in the instant case, except in accordance with the regulations applicable to all, absolutely ignores the treaty-reserved rights of these Indians. Conclusion of Law IV, *supra*, is plainly contrary to *Tulee*. For this reason alone, the judgment and decree must be reversed.

It is further argued therein that the scope of the treaty-reserved rights of the Indians may best be determined by a federal authority. The reasons supporting this argument are stated as follows:

> We must start with the established principle that interpretation of a treaty with an Indian tribe, like a treaty with a foreign nation, presents a federal question. *Worcester v. Georgia*, 6 Pet. 515 (1832). Had the Treaty itself, or Congress in contemporary or subsequent legislation, more specifically defined the right reserved or regulated how it was to be exercised (which would be another way of defining its scope), there would be no problem today. For, clearly, the federal statute would prevail, and no state law or regulation could impinge upon the Indians' exercise of the right as defined or regulated. See *Missouri v. Holland*, 252 U.S. 416 (1920), where the Supreme Court rejected the argument that implementing legislation pursuant to a treaty interfered with exercise of state regulatory provisions as to wildlife.

The brief then states that, pursuant to congressional action, the Secretary of the Interior and the Commissioner of Indian Affairs have proposed the adoption of certain rules relating to off-reservation treaty fishing which have been published in 30 Fed. Reg. 8969. The proposed rules were signed by the Under Secretary of the Interior on July 5, 1965. Whether they have yet been officially adopted, we are not advised.

I mention the government's amicus curiae brief at some length because this is the first indication we have had of what the government's legal or administrative position is in regard to the status of the Treaty of Medicine Creek or to a departmental solution of the problems heretofore presented to this court concerning the off-reservation fishing rights of treaty Indians.

Thus, we now have official information that the legal representatives of the government take the position that an Indian treaty is the same as a treaty with a foreign nation. I presume that this means that an Indian treaty

under the Supremacy Clause of the United States Constitution is the supreme law of the land. *Cf.* first opinion in *State v. Satiacum*, *supra*, and cases cited therein. We are also assured that the Interior Department is proposing to take some action regarding the regulation of off-reservation fishing by treaty Indians.

III.

I desire to point out that I disagree with the majority's discussion of the holding of the Court of Appeals in *Maison v. Confederated Tribes of Umatilla Indian Reservation*, 314 F.2d 169 (9th Cir. 1963), where that court said, at 172:

> That, in both the *Tulee* and *Makah* cases it was held that the Indians' right to fish is qualified by the state's right to regulate such fishing when necessary for conservation. But, to establish necessity the state must prove two facts: *first*, that there is a need to limit the taking of fish, *second*, that the particular regulation sought to be imposed is "indispensable" to the accomplishment of the needed limitation.

Before discussing whether the defendants have sustained their burden of proof it will be helpful to briefly explain the life cycle of the salmon and steelhead fish. Such fish are anadromous; that is to say, they are born in fresh water streams, migrate to and live the greater part of their lives in the ocean and, just before dying, return to the place of their birth to spawn. The fish born in a particular stream are delicately adjusted to its peculiar characteristics and instinctively return to it at the time of the year when successful spawning can occur. Attempts at stocking barren streams have been costly and only sporadically successful, and severe decimation of a run of fish in a particular stream can result in the permanent destruction of its population. In traveling upstream to spawn many debilitating hardships are encountered, including natural predators, disease and water pollution. By the time they reach the spawning ground, the body oils of the fish are practically used up, and they are often cut, bruised, diseased, and afflicted with fungus growths.

Defendants contend that "conservation through wise use, the keynote of modern fisheries management," dictates that the plaintiffs' fishing on the spawning grounds be restricted because the value of the fish there is highest as seed stock but lowest as food.

After discussing certain testimony presented by the Oregon officials, the Court of Appeals concluded:

> However, the treaty dealt only with the rights of the plaintiffs' ancestors, and did not secure rights to any other group or class. Therefore, while a restriction of the fishing activities of the plaintiffs must be *indispensable*, as required by the treaty [*Tulee v. Washington*, *supra*], a restriction of the fishing activities of other citizens of a state is valid if merely *reasonable*, as required by the Fourteenth Amendment to the United States Constitution. *Thomson v. Dana*, 52 F.2d 759 (D. Ore. 1931), aff'd. 285 U.S. 529, 52 S.Ct. 409, 76 L.Ed. 925 (1932). The complete exclusion of sports fishermen from the spawning grounds as an alternative does not amount to arbitrary discrimination against them, because the state possesses broader power to regulate sports fishing than it does to regulate fishing by the Indians. This one of the alternatives listed by the court being available, we need not discuss the others.

The word "indispensable" is said by the majority not to be supported by the two cases cited by the Court of Appeals, to wit, *Tulee v. Washington*, 315 U.S. 681, 86 L.Ed. 1115, 62 Sup. Ct. 862, and *Makah Indian Tribe v. Schoettler*, 192 F.2d 224 (9th Cir. 1951). However, the United States Supreme Court denied the state of Oregon's petition for certiorari in the *Maison* case (375 U.S. 829, 11 L.Ed.2d 60, 84 Sup. Ct. 73).

While the denial of certiorari is not to be considered as an expression of approval of the lower court's decision, the *Maison* case involved the interpretation of a treaty which under the Supremacy Clause of the United States Constitution is the supreme law of the land, and hence

could be authoritatively interpreted only by the United States Supreme Court. If the word "indispensable," in the context in which the court of appeals used it in the *Maison* case, substantially changed the meaning of the treaty as to the state's power of regulation of Indian fishing rights, one would suppose that, in view of the many conflicting decisions of various state and federal courts on this vital subject, the Supreme Court would have granted certiorari.[7]

The *Maison* decision was followed by Judge Solomon sitting in the United States District Court for the District of Oregon in *Confederated Tribes of the Umatilla Indian Reservation v. Maison*, —— F. Supp. — —(decided August 8, 1968). This case involved the right of treaty Indians to hunt game. The language of the treaty involved was similar to the treaty in the case now before us. In upholding the Indians' right under the treaty to hunt game, Judge Solomon said:

> In *Confederated Tribes of the Umatilla Indian Reservation v. Maison, et al.*, 186 F. Supp. 519, 520, I construed this article to mean that the State may not restrict the off-reservation fishing rights, set forth in the treaty without showing that such restriction was necessary for conservation of the fish. The Court of Appeals in affirming this decision laid down the test to be applied to State-imposed restrictions of treaty rights:
>
> ". . . while a restriction of the fishing activities of the plaintiffs must be *indispensable*, ... a restriction of the fishing activities of other citizens is valid if merely *reasonable* . . ." (314 F.2d 169, 174 emphasis is original).
>
> . . .
>
> In other words, defendants here contend that in spite of the provisions of the treaty, the Indians have no greater rights to fish and hunt off their reservation

7. This is the second time that the United States Supreme Court has failed to grant a petition for certiorari which sought an authoritative ruling on the status of an Indian treaty with respect to state police power. See discussion of *State v. Arthur*, 74 Ida. 251, 261 P.2d 135 (1953), found in *State v. Satiacum*, 50 Wn.2d at pages 525-529.

than any other Oregon citizen. This contention was made and rejected in *United States v. Winans*, 198 U.S. 371 (1905); *Tulee v. Washington*, 315 U.S. 681 (1942); and *Makah Indian Tribe v. Schoettler*, 192 F.2d 224 (9th Cir. 1951).

. . .

No one disagrees with the defendants' argument that regulation of fish and game resources is necessary and desirable, and that an intolerable situation would arise if all citizens were permitted to fish or hunt without restriction. However, the issue here is whether a State is permitted to proscribe or limit the treaty rights of Indians without showing that such restriction is indispensable. *Confederated Tribes, supra.*

Until the Supreme Court holds that the term "indispensable" is not the correct test to be used in determining the validity of state laws and regulations vis-a-vis the fishing rights of treaty Indians, I think that this court should not read the word out of the *Maison* decision and substitute "reasonable and necessary" therefor.

Even if the rule approved by the majority decision in the case at bar is followed (*i.e.* that the state has the burden of proving that its regulations are reasonable and necessary to conserve the fishery), I see no need for a further hearing.

The trial court stated in its memorandum decision that the total amount of salmon caught by Indians in the entire state in 1964 was only between 3 per cent and 5 per cent of the total number taken by Indians and non-Indians.

The trial court found the facts as to the fishing activities of appellants to be:

XIII. That the individual defendants began openly fishing the Puyallup River in 1953 contrary to the laws, rules and regulations of the State of Washington. Since that time, the defendants have gradually increased the intensity of their drift net and set net fisheries, using modern nylon monofilament nets, to the point that the

anadromous fish runs of the Puyallup River are presently unable to maintain themselves in an abundant supply without supplemental plantings by the state.

XIV. The Puyallup River from Commencement Bay to its upper tributaries constitutes and is a prime spawning and rearing area for anadromous fish.

XV. The defendants have indicated that unless restrained from so doing, they will continue to fish in the Puyallup River and Commencement Bay in the manner in which their fishing activities have taken place since 1953.

XVI. That the place, time, and manner of fishing by the defendants was and is in violation of the rules, and regulations of the State of Washington. That the fishing activities of the defendants, if allowed to proceed unrestrained could result in the destruction or serious impairment of the anadromous fish runs of the Puyallup River.

XVII. That once anadromous fish runs in a river system have been destroyed, it is generally impossible to reestablish them.

XVIII. It is reasonable and necessary that state conservation, rules and regulations be uniformly applied to all citizens on an equal basis including the defendants.

The ultimate finding of fact is that the fishing activities of appellants, if not restrained, *could* result in the destruction or serious impairment of the anadromous fish runs on the Puyallup River.

The above quoted findings do not, in my opinion, support the conclusion that:

> It is reasonable and necessary that state conservation rules and regulations be uniformly applied to all citizens on an equal basis including the defendants.

Neither do they justify the entry of the trial court's judgment and decree which contained the following injunctive provision:

It is hereby Ordered, Adjudged, and Decreed That:

The individual defendants and all members of the federal organization known as the "Puyallup Tribe" are hereby permanently enjoined from fishing in the Puyallup River watershed and Commencement Bay in any manner that is contrary to the laws of the State of Washington or contrary to the rules and regulations of the Department of Fisheries of the State of Washington and the Department of Game of the State of Washington.

I agree with the following statement made in the brief of the amici curiae Association on American Indian Affairs, Inc., as to the effect of the trial court's permanent injunction quoted above wherein it is said:

The decision below concerning the purported nonexistence of the Puyallup Tribe today is novel, wholly contrary to well-established principles of Indian law, and completely at odds with sound public policy. In the first place, only Congress, and clearly not the State courts, has power to effect the termination of tribal status. *Creek County v. Seber*, 318 U.S. 705, 718 (1943); *United States v. McGowan*, 302 U.S. 535, 538 (1938); *United States v. Nice*, 241 U.S. 591, 598 (1916); *United States v. Sandoval*, 231 U.S. 28 (1913). Indeed, the rule that sole responsibility for declaring when tribal existence has ended is vested in Congress has particular pertinence in this case where withdrawal of recognition from the Puyallup Tribe (at least in the view of the lower court) effectively would abrogate a solemn treaty commitment of the United States.

As indicated above, I likewise agree with the closing statement in the brief of the amicus curiae Association of Indian Affairs, Inc., which states:

The Superior Court's Findings of Fact and Conclusions of Law clearly fail to measure up to this standard. Neither the findings nor the memorandum deal

with the critical question—i.e., whether the State could accomplish its conservation objectives through more rigorous regulation of non-Indian fishing or by other means not having an impact upon appellants. Similarly, the court below appears not to have considered whether preservation of the Puyallup River fishery, assuming the need for regulation, requires so severe a curtailment of Indian fishing as the respondents here seek to impose. Such disregard for the applicable law, particularly as enunciated by the United States Court of Appeals for this Circuit, cannot be allowed to stand.

In summary, unlike their non-Indian fellow-citizens, enrolled members of the Puyallup Tribe have a vested property right under the Treaty of Medicine Creek to fish at all usual and accustomed places outside their reservation. This off-reservation right to take fish, so essential to the Indians' very existence, is protected under Federal law, and, at the very least, may be limited by State law only under extraordinary circumstances. As a matter of law, the Washington conservation statutes and regulations may not be enforced against Indian treaty fishing rights in the same manner as they are against the bare fishing privileges of other persons. In the former situation, unlike the latter, the State of Washington has the burden of proving affirmatively that application to appellants of the attempted regulations is indispensable to the conservation of the fish resource and the task of further proving that the desired conservation goals cannot be achieved in some other fashion. Respondents made no such showing in the lower court.

Unless it be held that Indian treaties are not treaties within the meaning of the Supremacy Clause of the United States Constitution and hence are not the supreme law of the land and do not override the police power of the states (contrary to the holding of the Supreme Court, cited below),[8] I can only reach the conclusion that the judgment and decree of the trial court should be reversed with directions to dismiss the action.

8. See cases discussed in the first *Satiacum* opinion (50 Wn.2d at pages 516-519).

In *State v. Quigley*, 52 Wn.2d 234, 324 P.2d 827 (1958), a case in

I am further of the opinion that respondents have failed to prove either that the state laws and regulations here involved are *either* indispensable or reasonably necessary to the conservation of salmon fishery on the Puyallup River and hence would reverse and dismiss for that reason.

HUNTER, J. (dissenting)—I dissent. The ultimate holding of the majority is that the Puyallup Indians are subject to *regulations reasonable and necessary* for the preservation of the fishery. The majority's modification of the trial court's injunction when read with this holding is not consistent. The trial court properly applied our existing conservation laws to the Puyallup Indians by its injunction. The power of the state of Washington to regulate fishing for purposes of conservation has been clearly recognized as applying to the Indians *equally with others* by the United States Supreme Court in the case of *Tulee v. Washington*, 315 U.S. 681, 684, 86 L.Ed. 1115, 1119, 62 Sup. Ct. 862, 864 (1941). In this case Justice Black for the court stated:

> We think the state's construction of the treaty is too narrow and the appellant's too broad; that, while *the treaty leaves the state with power to impose on Indians, equally with others, such restrictions of a purely regulatory nature concerning the time and manner of fishing outside the reservation as are necessary for the conservation of fish*, it forecloses the state from charging the Indians a fee of the kind in question here. (Italics mine.)

Our present laws and regulations relating to the use of gear, and the time and place of taking fish are for no other purpose than the reasonable and necessary preservation of the fishery. These laws and regulations accomplish the purpose of the ultimate holding of the majority and there-

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which a non-treaty Indian claimed the right to hunt deer on his own property without a hunting license, this court, in a unanimous en banc opinion concluded with this dictum: "Of course, a treaty takes precedence over a state law, but appellant has no treaty rights that restrict the state in its exercise of the police power. Our question, therefore, must be answered in the affirmative."

fore should have been imposed on the Indians *equally with others* as was done by the trial court.

In my opinion the ultimate holding of the majority is consistent with the injunction entered by the trial court, and there is no need for its modification.

ROSELLINI and HALE, JJ., concur with HUNTER, J.

HALE, J. (concurring in the dissent)—I agree with and have signed Judge Hunter's dissenting opinion. As a preface to further comment, it should be noted that this case has nothing to do with protecting or preserving for the Indians any rights in land or personal property or fostering their management of business or tribal affairs. It involves only the claims of a right to fish in places where all others are forbidden.

Appellants assert the right under a treaty to violate the laws of a sovereign state, laws designed to preserve, protect and develop a great natural resource that contributes vastly to the economic and recreational welfare of millions of its citizens. Appellants claim powers which, if exercised in full, will inevitably destroy this resource in the Puyallup River.

I find no language in the Treaty of Medicine Creek (10 Stat. 1132) concluded December 26, 1854, by Isaac I. Stevens, Governor and Superintendent of Indian Affairs of the Territory of Washington, on behalf of the United States and the "chiefs, headmen, and delegates of the Nisqually, Puyallup, Steilacoom, Squawskin, S'Homamish, Stehchass, T'Peeksin, Squi-aitl, and Sa-heh-wamish tribes and bands of Indians,"[9] warranting the conclusion that the Indians should be forever immune from the state's game and fishery laws. The most cogent language of the treaty, that particular phraseology designed to prevent unfair and invidious discrimination against the Indians and which vouchsafed to them the right to hunt and fish, granted these very rights *in common with all citizens of the territory*. See Treaty with Nisqualli, Puyallup, Etc., 1854, art. 3, 2 Indian Affairs, Laws and Treaties 496 (1902). As I would permit no discrimination against the

9. 2 Indian Affairs, Laws and Treaties 495 (1902).

descendants of the Puyallups, I would allow no discrimination in their favor either.

In my opinion, most of the decisional law written about Indian treaties, although intended to protect the American Indian in the rights to property and the pursuit of happiness, has had a contrary effect. Decisions relating to Indian treaties begin with the hope of protecting the Indian, and inevitably end by treating the Indians as aborigines, and in doing so not only have tended to degrade the Indian and perpetuate the stigma of second-class citizenship earlier surrounding him but blinded this country to the need for legislation which will genuinely rehabilitate our Indian citizens and enable them to play a full and active role in the affairs of this state and country in common with all citizens of whatever racial origin.

The majority decision fosters an illusion that somehow by regarding the Treaty of 1854 as a device to confer upon shareholder members in appellant, The Puyallup Tribe, Inc., special privileges, immunities and emoluments not shared equally with descendants of the white settlers of 1854 or the citizenry at large, the courts are righting a wrong long suffered by the Indians.

But while intending otherwise, the opinion discriminates in favor of the Indians, granting to a few of them special favors, privileges and immunities not claimed or shared by other Indians, and perpetuating the idea that a treaty with the natives in 1854 is a viable compact with their remote descendants. In holding thus, the decision again delays the day when some descendants of the Puyallups will achieve full responsibility as citizens. I would put an end to such an invidious and discriminatory concept, and read the treaty as it was written.

Next, on the question of tribal existence, I think the evidence establishes and the learned trial judge rightly found that appellant, The Puyallup Tribe, Inc., never acquired nor now has any rights under the treaty. I believe that the tribe or band which signed the Treaty of Medicine Creek of 1854 has long since disappeared, its

lands sold and descendants absorbed into the body politic and that the conclusion of the learned trial judge that

> There is no presently existing Puyallup Tribe of Indians which succeeds in interest to the original Puyallup Indian Tribe which was signatory to the Treaty of Medicine Creek.

is well supported by both the history of the tribe and the evidence in the case. This finding and the judgment should be affirmed.

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

Remittitur

No. 38611

Pierce

County

No. 158069

DEPARTMENT OF GAME of the State of Washington and the DEPARTMENT OF FISHERIES of the State of Washington,
Respondents,

v.

THE PUYALLUP TRIBE, INC., a corporation, *et al.*,
Appellants.

The State of Washington to: The Superior Court of the State of Washington in and for Pierce County

This is to certify that the opinion of the Supreme Court of the State of Washington filed on January 12, 1967, became the final judgment of this court in the above entitled case on March 13, 1967. This cause is remitted to the superior court from which the appeal was taken for further proceedings in accordance with the attached certified copy of the opinion.

Pursuant to Rule 55 on Appeal, costs are taxed as follows:

No cost bill having been filed, costs are deemed waived.

cc: Court Reporter
Mr. Arthur Knodel
Mr. Malcolm McLeod
Hon. John J. O'Connell
Mr. Joseph L. Coniff
Mr. Mike Johnston

IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed the seal of said Court at Olympia, this 15th day of March, A.D. 1967.

WILLIAM M. LOWRY, *Clerk of the Supreme Court, State of Washington.*

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON IN AND FOR THE COUNTY OF PIERCE

No. 158069

Amended Injunction

DEPARTMENT OF GAME of the State of Washington and the DEPARTMENT OF FISHERIES of the State of Washington,
Plaintiffs,

v.

THE PUYALLUP TRIBE, INC., a Federal Organization, *et al.*,
Defendants.

This matter having come on regular for hearing before this court upon the motion of plaintiffs and defendants to amend the permanent injunction heretofore entered by this court, the plaintiffs and defendants being represented by counsel, and the court being fully advised; now therefore,

IT is hereby ordered, adjudged, and decreed that:

The individual defendants and all members of the federal organization known as the "Puyallup Tribe" are hereby permanently enjoined from driftnet or setnet fishing in the Puyallup River watershed and Commencement Bay in any manner that is contrary to the laws of the State of Washington or contrary to the rules and regulations of the Department of Fisheries of the State of Washington and the Department of Game of the State of Washington.

DONE IN OPEN COURT this 2nd day of June, 1967.
John D. Cochran, *Judge of the Superior Court*

Presented by:
J. L. Coniff,
Special Assistant Attorney General
Of Counsel for Plaintiffs.

APPENDIX C

CONFLICTING OPINIONS

H. G. MAISON, Individually and as Superintendent, Dept. of State Police of the State of Oregon, *et al.*, *Appellants*,

v.

CONFEDERATED TRIBES OF THE UMATILLA INDIAN RESERVATION, *et al.*, *Appellees*.

No. 17139

UNITED STATES COURT OF APPEALS
NINTH CIRCUIT

Feb. 15, 1963.

Robert Y. Thornton, Atty. Gen. of Oregon, Arthur G. Higgs and Roy C. Atchison, Asst. Attys. Gen., Salem, Or., for appellant.

Frank E. Nash, Mark C. McClanahan, King, Miller, Anderson, Nash & Yerke, Portland, Or., for appellees.

Before HAMLIN, Merrill and KOELSCH, Circuit Judges.

KOELSCH, Circuit Judge.

This case involves fishing rights of the Confederated Tribes of the Walla Walla, Cayuse and Umatilla Indians under a treaty with the United States.

[1] The District Court had jurisdiction under the provisions of 28 U.S.C. § 1331, relating to federal questions, and 28 U.S.C. § 2201, the Federal Declaratory Judgments Act. The provisions of 28 U.S.C. § 2281, requiring a three-judge court are not applicable and trial was properly had before a single judge.[1] Jurisdiction is

1. 28 U.S.C. § 2281 provides that where an injunction is sought restraining the enforcement or execution of a state statute or an order of an administrative agency acting thereunder, upon the ground of the unconstitutionality of such statute, the matter must be determined by a district court composed of three judges. But that provision has no application to this litigation, for the issue is not whether a statute of the State of Oregon or a regulation of its Game Commission is unconstitutional; rather, the issue is whether statutes and regulations, admittedly valid, can be applied to these plaintiffs. See *Phillips v. United States*, 312 U.S. 246, 61 S.Ct. 480, 85 L.Ed. 800 (1941).

conferred upon this court under the provisions of 28 U.S.C. § 1291.

It appears that late in May of 1855 a joint council was held at Camp Stevens in the Walla Walla Valley of the State of Washington between representatives of the United States and certain Indian tribes of Washington and Oregon. At that council the plaintiffs' ancestors were persuaded to accept a treaty containing the following provision:

> "*Provided, also,* That the exclusive right of taking fish in the streams running through and bordering said reservation is hereby secured to said Indians, and at all other usual and accustomed stations in common with citizens of the United States, and of erecting suitable buildings for curing the same; the privilege of hunting, gathering roots and berries and pasturing their stock on unclaimed lands in common with citizens, is also secured to them."[2]

The controversy here concerns that portion of the treaty provision which relates to the Indians' right to fish outside their reservation "in common with citizens of the United States."

In 1958 the Oregon State Game Commission promulgated regulations prohibiting fishing on tributaries of the Columbia and Snake Rivers during part of the year. Shortly thereafter, the Commission caused three Indians to be arrested for fishing during the closed season in certain Blue Mountain streams that run into the Columbia. It further threatened to have arrested any members of the Confederated Tribes who fished contrary to the laws and regulations of Oregon.

Contending that the state's restriction of their fishing activities was contrary to the rights guaranteed them by treaty, the Confederated Tribes and several of its tribesmen sought a declaratory judgment and injunction. The court's judgment was generally favorable to the Indians:

> "Ordered, Adjudged, and Decreed that the Confed-

2. Treaty with the Walla Walla, Cayuses, and Umatilla Tribes and Bands of Indians, June 9, 1855, Art. 1, 12 Stat. 945.

erated Tribes of the Umatilla Indian Reservation and the members thereof have a right, privilege, and immunity afforded them under the Treaty of June 9, 1855, between said Tribes and the United States of America, to catch salmon and steelhead for subsistence purposes at all usual and accustomed stations on tributaries of the Columbia and Snake Rivers in Oregon, including the John Day, Walla Walla, Grande Ronde, and Imnaha River systems, without restriction or control under the game laws of the State of Oregon or regulations issued pursuant thereto."

Although the court declined to issue an injunction, it retained jurisdiction to grant such relief. The defendants have appealed.[3]

The extent of Indian fishing rights under a treaty between the United States and the Yakima Indians was in issue in *United States v. Winans*, 198 U.S. 371, 25 S.Ct. 662, 49 L.Ed. 1089 (1905). The court observed that prior to the treaty the Indians had unlimited fishing rights:

"The right to resort to the fishing places in controversy was a part of larger rights possessed by the Indians, upon the exercise of which there was not a shadow of impediment, and which were not much less necessary to the existence of the Indians than the atmosphere they breathed." 198 U.S. at 381, 25 S.Ct. 664.

Explaining the effect of the treaty upon those rights, the court continued:

"New conditions came into existence, to which those rights had to be accommodated. Only a limitation of them, however, was necessary and intended, not a taking away. In other words, the treaty was not a grant of rights to the Indians, but a grant of rights from them —*a reservation of those not granted.*" (Emphasis added.) *Ibid.*

The treaty involved in the instant case is substantially similar to the Yakimas' treaty and was negotiated at the

3. The trial court's opinion is reported at D.C., 186 F. Supp. 519.

same common council. Thus, the Supreme Court's analysis applies equally here. We hold that the plaintiffs' treaty reserves to them those unimpeded fishing rights which their ancestors had long enjoyed before the treaty, subject only to the qualifications contained within that document. But, the question remains, what are those qualifications?

One of them was pointed out in the *Winans* case. There it was stated that, because of the provision that the Indians were to fish "in common with citizens," the Indians had not retained an exclusive right to fish at their usual and accustomed stations. Citizens might share it.[4] *United States v. Winans, supra* at 381.

Another of the qualifications was explained in *Tulee v. Washington*, 315 U.S. 681, 62 S.Ct. 862, 86 L.Ed. 1115 (1942) and *Makah Indian Tribe v. Schoettler*, 192 F.2d 224 (9th Cir. 1951). In the former case it appears that one Tulee, an Indian, was convicted of catching salmon without a license required by a statute of the State of Washington. Tulee claimed the protection of the same treaty that was involved in the *Winans* case, arguing that it gave him a right to fish without restriction "at all usual and accustomed places" within the ceded area. The State countered with the argument that, because of the phrase "in common with citizens" the appellant's rights were no greater than those of other citizens. The court did not wholly approve either contention, but said:

> "We think the state's construction of the treaty is too narrow and the appellant's too broad; that, while the treaty leaves the state with power to impose on Indians, equally with others, such restrictions of a purely regulatory nature concerning the time and manner of fishing outside the reservation *as are necessary for the conservation of fish*, it forecloses the state from charging the Indians a fee of the kind in question here." (Emphasis added.) *Tulee v. Washington, supra*, 315 U.S. at 684, 62 S.Ct. at 864.

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4. Of course, this does not mean that a state cannot, by reasonable laws and regulations, exclude from fishing those of its citizens who are not parties to the treaty.

We applied the doctrine of the *Tulee* case in Makah. In that case the State of Washington had, be regulation, prohibited the catching of fish in the Hoko River except with a certain type of gear. As justification for the application of its regulation to the Indians, the State argued that the provision in the Makah Indians' treaty granting to them the right to fish "in common with all citizens" meant that the rights of the Indians were the same, and no greater, than those possessed by other citizens. However, rejecting that argument, we said: "The Supreme Court held in the *Tulee* case that where a treaty guarantees certain fishing rights to Indians and a state regulation impairs this right, the state must prove that its regulation is 'necessary' * * *." *Makah Indian Tribe v. Schoettler, supra,* 192 F.2d at 226.

Thus, in both the *Tulee* and *Makah* cases it was held that the Indians' right to fish is qualified by the state's right to regulate such fishing when necessary for conservation. But, to establish necessity the state must prove two facts: *first,* that there is a need to limit the taking of fish, *second,* that the particular regulation sought to be imposed is "indispensable" to the accomplishment of the needed limitation.

Before discussing whether the defendants have sustained their burden of proof it will be helpful to briefly explain the life cycle of the salmon and steelhead fish. Such fish are anadromous; that is to say, they are born in fresh water streams, migrate to and live the greater part of their lives in the ocean and, just before dying, return to the place of their birth to spawn. The fish born in a particular stream are delicately adjusted to its peculiar characteristics and instinctively return to it at the time of the year when successful spawning can occur. Attempts at stocking barren streams have been costly and only sporadically successful, and severe decimation of a run of fish in a particular stream can result in the permanent destruction of its population. In traveling upstream to spawn many debilitating hardships are encountered, including natural predators, disease and water pollution. By the time they reach the spawning ground, the body oils of the fish are practically used up and they

are often cut, bruised, diseased, and afflicted with fungus growths.

Defendants contend that "conservation through wise use, the keynote of modern fisheries management," dictates that the plaintiffs' fishing on the spawning grounds be restricted because the value of the fish there is highest as seed stock but lowest as food. In support of that contention they cite the testimony of three expert witnesses; namely, Robert N. Thompson, a fishery biologist of the Fish Commission of Oregon, Richard T. Pressey, Supervisor of Research for the Department of Fisheries of the State of Washington, and Dr. H. John Rayner, Chief of the Wildlife Research Division of the Oregon State Game Commission.

Thompson's testimony, to the effect that unrestricted fishing of sufficient industry could exhaust the spawning beds, is a proposition about which there can be no quarrel. However, he did not relate that proposition to the facts of this case, but, on the contrary, testified that the plaintiffs have never shown a disposition to fish with marked intensity.

Pressey testified that commercial fishing by Indians on spawning grounds in the State of Washington had seriously reduced some runs; further, that the taking of fish by the plaintiffs for their own subsistence would have a similar, although not as serious, effect. However, the trial court was not bound to accept this testimony. It was largely based upon the reports of an interested party; furthermore, the witness acknowledged that the number of fish had been increasing in the Blue Mountain streams in recent years and that, in the absence of depletion, there would be no need for regulation.

Dr. Rayner testified that the taking of fish from the spawning grounds creates an "unhealthy situation," that it is inconsistent with "efficient conservation methods," that "indiscriminate" fishing endangers the fish life of a stream, and that fish "must be protected" in their spawning beds. These statements are ambiguous and vague, but even if they reflected an opinion of the witness that restriction of plaintiffs' fishing was necessary for con-

servation, nevertheless, that opinion was not binding on the trial court.

In Dr. Rayner's view, "conservation" is a term which involves a compromise of the competing interests of the many groups of society that desire or need fish. Such a definition is reasonable. However, Dr. Rayner further explained that, by "conservation," the Oregon Game Commission seeks to protect only commercial and sports fishermen, having no regard for the welfare of Indians. If, as it is reasonable to believe, Dr. Rayner used the word "conservation" in the sense that it was used by his employer, the Oregon Game Commission, when he testified to the necessity for conservation, he really meant, "I believe that the regulations are necessary to conserve fish for commercial and sports fishermen, disregarding the needs of the Indians altogether."

[2] Such a statement is not evidence of that "necessity for conservation" required by the *Tulee* case. In that case the Supreme Court held that a regulation, to be necessary, must be "indispensable" to the effectiveness of a state conservation program. It follows that restriction of the fishing of Indians is justifiable only if necessary conservation cannot be accomplished by a restriction of the fishing of others. Dr. Rayner, in testifying that a limitation of plaintiffs' fishing was necessary, not only ignored that requirement, but based his opinion on the contrary premise that the taking of fish by Indians can validly be restricted to satisfy the needs of the rest of society.

[3, 4] But even if the trial judge disregarded the many deficiencies and contradictions in the experts' testimony and attributed to that testimony some probative value on the issue of necessity, nevertheless, his decision that the defendants failed to sustain their burden of proof on that issue must be upheld. The trier of fact is not bound to adopt the conclusion of experts where it is contrary to his best judgment. *United States v. Hill*, 62 F.2d 1022 (8th Cir. 1933); *Tracy v. Commissioner*, 53 F.2d 575 (6th Cir. 1931), cert. denied, 287 U.S. 632, 53 S.Ct. 83, 77 L.Ed. 548 (1932). The trial judge could justifiably doubt the validity of the experts' conclusions

in view of the other evidence that the number of fish taken by the plaintiffs is only a small percentage of the total salmon and steelhead harvest; that the plaintiffs have never, in over a century, destroyed a salmon run in the Blue Mountain streams or so depleted a run that destruction was threatened; and that, not only has the number of fish in these streams been increasing in recent years, the population of the Confederated Tribes is small and probably is declining.[5]

Because the court found that no conservation was necessary its broadly worded judgment, applying to any laws or regulations of the State of Oregon, is proper. Of course, a substantial change in conditions may warrant the later imposition of restrictions upon plaintiffs' fishing.

In its opinion the trial court stated:

> "Although the closure of streams during portions of the year is one method of conserving the resource and may be generally fair and convenient, it cannot be permitted to curtail treaty fishing rights of Indians where there are alternative methods of attaining the same objectives."[6]

It is apparent from this that the judgment not only was grounded upon a finding that no restriction of plaintiffs' fishing was necessary, but also, upon a finding that if it was necessary, the laws and regulations specifically involved in this case could not be imposed.

But the defendants argue that none of the alternative conservation measures specifically enumerated in the trial court's findings were available. For example, one of those listed was that the defendants could achieve conservation by limiting or prohibiting the taking of fish by sportsmen on the spawning grounds, and defendants argue that to do this would violate the provisions of the treaty.

[5, 6] However, the treaty dealt only with the rights of the plaintiffs' ancestors, and did not secure rights

5. In 1855 there were approximately 1500 Indians in the Confederated Tribes; at the time of the trial they numbered only about 1200.

6. Confederated Tribes of the Umatilla Indian Reservation v. Maison, 186 F. Supp. 519, 520-521 (D.Or.1960).

to any other group or class. Therefore, while a restriction of the fishing activities of the plaintiffs must be *indispensable*, as required by the treaty [*Tulee v. Washington*, *supra*], a restriction of the fishing activities of other citizens of a state is valid if merely *reasonable*, as required by the Fourteenth Amendment to the United States Constitution. *Thomson v. Dana*, 52 F.2d 759 (D. Ore. 1931), aff'd 285 U.S. 529, 52 S.Ct. 409, 76 L.Ed. 925 (1932). The complete exclusion of sports fishermen from the spawning grounds as an alternative does not amount to arbitrary discrimination against them, because the state possesses broader power to regulate sports fishing than it does to regulate fishing by the Indians. This one of the alternatives listed by the court being available, we need not discuss the others.

The judgment is affirmed.

[No. 33545. *En Banc*. July 1, 1957]

THE STATE OF WASHINGTON, *Appellant*, *v.* ROBERT SATIACUM, *et al.*, *Respondents*.[1]

Appeal from a judgment of the Superior Court for Pierce County, No. 32128, Soule, J., entered October 20, 1955, dismissing a prosecution for illegal fishing. Affirmed.

John J. O'Connell, John A. Petrich, Keith D. McGoffin, and *John G. McCutcheon*, for appellant.

Malcom Stewart McLeod and *Wing C. Luke*, for respondents.

John J. O'Connell, Joseph T. Mijich, Nathan G. Richardson, Arthur Lazarus, Jr., and *Theodore H. Little*, *amici curiae*.

DONWORTH, J.—The only question presented on this appeal involves the right of defendants, who are Puyallup Indians, to fish on the Puyallup River during the closed season (1) within the exterior boundaries of the original Puyallup Indian reservation, and (2) "at all usual and

1. Reported in 314 P.2d 400.

accustomed fishing grounds and stations" under the treaty of Medicine Creek of 1855. 10 Stat. 1132.

Defendants were jointly charged by amended complaint in justice court with five counts of illegal fishing, alleged to have occurred on November 10 and 11, 1954, on the Puyallup River in Pierce County.

The acts alleged to be contrary to statute were (1) use of a net for the purpose of catching food fish (salmon), contrary to the provisions of R.C.W. 75.12.060; (2) use of a net for the purpose of catching game fish (steelhead), contrary to the provisions of R.C.W. 77.16.060; (3) possession of game fish during the closed season, contrary to the provisions of R.C.W. 77.16.030 and rules and regulations promulgated by the state game commission under authority of R.C.W. 77.12.010 *et seq.*; and (4) possession of food fish during the closed season, contrary to rules and regulations promulgated by the director of fisheries under authority of R.C.W. 75.08-.010 *et seq.*

After trial in justice court, James Young was found guilty on four counts, and Robert Satiacum was found guilty on two counts. They appealed to the Superior Court of Pierce County, and following a trial *de novo*, the court entered a judgment of dismissal, stating, in part, as follows:

"IT IS ORDERED, ADJUDGED and DECREED that the within cause be and hereby is dismissed as to each count for want of sufficient evidence, it appearing from the oral stipulation herein that the defendants are Puyallup Indians, that they claim fishing rights under the Treaty of Medicine Creek of 1855, and that the acts herein took place at a usual and accustomed fishing ground of the Puyallup Indians, and the State having failed to introduce any evidence that as to Puyallup Indians the statutes and regulations herein involved were reasonable and necessary for the conservation of fish."

Briefly stated, the events which led to the arrest of respondents are as follows:

On November 10, 1954, law enforcement officers ob-

served James Young tending two fixed nets located on the Puyallup River within the city limits of Tacoma. The law enforcement officers testified that on that date Mr. Young had two salmon in his possession, but they did not arrest him.

On November 11, 1954, these same officers observed both defendants on the same location tending the two nets. The officers testified that defendants had three steelhead fish in their possession on this date, at which time defendants were arrested.

The parties stipulated that there is in full force and effect the treaty of Medicine Creek of 1855, a valid treaty between the Medicine Creek tribes and the United States; that the Puyallup Indian tribe is one of the Medicine Creek tribes and a signator to the treaty of 1855; that the defendants in this action are descendants of the original Puyallup tribe of Indians and are presently on the rolls of the Puyallup tribe of Indians, a tribe recognized by the secretary of the interior and the bureau of Indian affairs as a regular, organized Indian tribe under the Wheeler-Howard act of 1934, as amended (25 U.S.C. §§ 461-479); that the "lower river net" was located inside the original Puyallup Indian reservation, established by treaty with the United States, but that the land on each side of the river had been alienated by the Puyallup Indians; and that the "upper river net" was at a usual and accustomed fishing ground of the Puyallup tribe of Indians, as defined by the treaty.

In dismissing the cause, the trial court based its decision upon the recent case of *Makah Indian Tribe v. Schoettler*, 192 F.2d 224 (C.A. 9th), wherein it was held that the state of Washington had failed to sustain the burden of proving that the regulation there in question was reasonable and necessary for the conservation of fish.

The state has appealed from the trial court's dismissal of the charges. Its sole assignment of error is directed to

"The dismissal of the case as to each count for want of sufficient evidence as to the reasonableness and necessity of the statutes and regulations involved for the conservation of fish."

Respondents contend that, while the *Makah* case is authority for sustaining the judgment of the trial court, the real issue presented for decision is whether the police power of the state, as expressed in the statutes above referred to, can impair the rights guaranteed to the Indians under the treaty of She-Nah-Nam or Medicine Creek of 1855.

This treaty is one of several treaties entered into by Territorial Governor Isaac I. Stevens, as representative of the United States, and the Indian tribes in the Washington territory following its creation. As a result of the Medicine Creek treaty, a vast territory was "ceded" to the United States by the Indians, and a small tract of land extending inward from the mouth of the Puyallup River was retained by the Indians as a reservation.

Article III of the treaty provides as follows:

"The right of taking fish, *at all usual and accustomed grounds and stations,* is further secured to said Indians, *in common with all citizens of the Territory,* and of erecting temporary houses for the pupose of curing, together with the privilege of hunting, gathering roots and berries, and pasturing their horses on open and unclaimed lands: . . ." (Italics ours.) 10 Stat. 1132.

Since our decision in this case turns upon the proper construction of this article of the treaty, and since the supreme court of the United States is the only tribunal having the power to interpret authoritatively the United States constitution and treaties made thereunder, we find it necessary to review its decisions relating to the construction of Indian treaties.

All Indian treaties entered into prior to 1871 were consummated pursuant to Art. II, § 2 of the United States constitution. Article VI, commonly referred to as the "supremacy clause," provides:

"This Constitution, and the laws of the United States which shall be made in pursuance thereof; and *all treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land; and*

the judges in every state shall be bound thereby, anything in the Constitution or laws of any state to the contrary notwithstanding." (Italics ours.)

The supreme court has consistently held that Indian treaties have the same force and effect as treaties with foreign nations, and consequently are the supreme law of the land and are binding upon state courts and state legislatures notwithstanding state laws to the contrary. *Cherokee Nation v. Georgia,* 5 Pet. (U.S.) 1, 8 L.Ed. 25; *Worcester v. Georgia,* 6 Pet. (U.S.) 515, 8 L.Ed. 483; *Blue Jacket v. Johnson County Commissioners* (*Kansas Indians*), 5 Wall. (U.S.) 737, 18 L.Ed. 667; *Holden v. Joy,* 17 Wall. (U.S.) 211, 21 L.Ed. 523; *United States v. New York Indians,* 173 U.S. 464, 43 L.Ed. 769, 19 S.Ct. 487; *Jones v. Meehan,* 175 U.S. 1, 44 L.Ed. 49, 20 S.Ct. 1; *Choctaw Nation v. United States,* 179 U.S. 494, 45 L.Ed. 291, 21 S.Ct. 149; *United States v. Winans,* 198 U.S. 371, 49 L.Ed. 1089, 25 S.Ct. 662. See, also, 4 A.L.R. 1380, 134 A.L.R. 882-888, 11 Am. Jur. 650, § 43, 27 Am. Jur. 548, § 10.

In the *Worcester* case, *supra,* the state of Georgia had attempted to prosecute a missionary who had gone upon the Cherokee Indian reservation with the permission of the tribal council, but contrary to a state statute. The supreme court, speaking through Chief Justice Marshall, stated, in part, as follows:

"The Indian nations had always been considered as distinct, independent, political communities, retaining their original natural rights, as the undisputed possessors of the soil, from time immemorial, with the single exception of that imposed by irresistible power, which excluded them from intercourse with any other European potentate than the first discoverer of the coast of the particular region claimed; and this was a restriction which those European potentates imposed on themselves, as well as on the Indians. *The very term 'nation,' so generally applied to them, means 'a people distinct from others.' The constitution, by declaring treaties already made, as well as those to be made, to be the supreme law of the land, has adopted and sanctioned the previous treaties with the Indian nations, and consequently, admits their rank*

among those powers who are capable of making treaties. The words 'treaty' and 'nation,' are words of our own language, selected in our diplomatic and legislative proceedings, by ourselves, having each a definite and well-understood meaning. *We have applied them to Indians, as we have applied them to the other nations of the earth;* they are applied to all in the same sense." (Italics ours.)

The statute was held void, since it conflicted with the Cherokee Indian treaty, which was declared to be the supreme law of the land.

In the case of *Missouri v. Holland*, 252 U.S. 416, 64 L.Ed. 641, 40 S.Ct. 382, 11 A.L.R. 984, the supreme court construed a treaty between the United States and Great Britain which had been executed in an effort by the two nations to conserve migratory waterfowl known to traverse many parts of the United States and Canada in their annual migrations. Subsequently, Congress had enacted the migratory bird treaty act of July 3, 1918, and the state brought a bill in equity to prevent a United States game warden from attempting to enforce the statute and regulations made pursuant thereto. The argument was advanced by the state of Missouri that the treaty infringed upon the constitution, was void as an interference with the rights reserved to the states by the tenth amendment, and that the acts of the United States, pursuant to the treaty, invaded the sovereign and plenary right of the state to regulate and conserve wildlife and contravened its will manifested in statutes. The supreme court, speaking through Justice Holmes, stated:

"To answer this question it is not enough to refer to the Tenth Amendment, reserving the powers not delegated to the United States, because by Article II, § 2, the power to make treaties is delegated expressly, and by Article VI treaties made under the authority of the United States, along with the Constitution and laws of the United States made in pursuance thereof, are declared the supreme law of the land. . . .

"As most of the laws of the United States are carried out within the States and as many of them deal with

matters which in the silence of such laws the State might regulate, such general grounds are not enough to support Missouri's claim. *Valid treaties of course 'are as binding within the territorial limits of the States as they are elsewhere throughout the dominion of the United States.'* . . .

"We are of opinion that the treaty and statute must be upheld." [Citing case.] (Italics ours.)

(The statute referred to was the act of Congress passed to implement the treaty.)

In the case of *Asakura v. Seattle*, 265 U.S. 332, 68 L.Ed. 1041, 44 S.Ct. 515, the supreme court construed a treaty with Japan, and stated:

"A treaty made under the authority of the United States 'shall be the supreme law of the land; and the judges in every State shall be bound thereby, any thing in the constitution or laws of any State to the contrary notwithstanding.' Constitution, Art. VI, § 2.

"The treaty-making power of the United States is not limited by any express provision of the Constitution, and, though it does not extend 'so far as to authorize what the Constitution forbids,' it does extend to all proper subjects of negotiation between our government and other nations. *Geofroy v. Riggs*, 133 U.S. 258, 266, 267; *In re Ross*, 140 U.S. 453, 463; *Missouri v. Holland*, 252 U.S. 416. The treaty was made to strengthen friendly relations between the two nations. As to the things covered by it, the provision quoted establishes the rule of equality between Japanese subjects while in this country and native citizens. Treaties for the protection of citizens of one country residing in the territory of another are numerous, and make for good understanding between nations. *The treaty is binding within the State of Washington.* [Citing case.] The rule of equality established by it cannot be rendered nugatory in any part of the United States by municipal ordinances or state laws. *It stands on the same footing of supremacy as do the provisions of the Constitution and laws of the United States.* It operates of itself without the aid of any legislation, state or national; and

it will be applied and given authoritative effect by the courts. [Citing cases.] (Italics ours.)

A Seattle municipal ordinance, which purported to prevent citizens of Japan from engaging in the pawnbroking business, was held invalid, since it conflicted with the Japanese treaty.

In the case of *Nielsen v. Johnson*, 279 U.S. 47, 73 L.Ed. 607, 49 S.Ct. 223, the supreme court construed a treaty with Denmark and stated:

"Treaties are to be liberally construed so as to effect the apparent intention of the parties. [Citing cases.] When a treaty provision fairly admits of two constructions, one restricting, the other enlarging rights which may be claimed under it, the more liberal interpretation is to be preferred, [citing cases] and as the treaty-making power is independent of and superior to the legislative power of the states, *the meaning of treaty provisions so construed is not restricted by any necessity of avoiding possible conflict with state legislation and when so ascertained must prevail over inconsistent state enactments.*" (Italics ours.)

The court held invalid an Iowa inheritance tax statute, which purported to levy a discriminatory tax on property inherited by a citizen of Denmark, because it violated the treaty provisions.

All Indian treaties are construed by the courts in favor of the Indians, in an endeavor to exercise toward them the highest degree of good faith, because of the dominant position of the United States. *Worcester v. Georgia, supra; Holden v. Joy, supra; Jones v. Meehan, supra; United States v. Kagama*, 118 U.S. 375, 30 L.Ed. 228, 6 S.Ct. 1109; *United States v. Winans, supra; Seufert Bros. Co. v. United States*, 249 U.S. 194, 63 L.Ed. 555, 39 S.Ct. 203; *United States v. Shoshone Tribe*, 304 U.S. 111, 82 L.Ed. 1213, 58 S.Ct. 794; *Tulee v. Washington*, 315 U.S. 681, 86 L.Ed. 1115, 62 S.Ct. 862; *State v. Arthur*, 74 Ida. 251, 261 P.2d 135; *State v. McClure*, 127 Mont. 534, 268 P.2d 629.

[1] Keeping in mind the rules of construction hereto-

fore cited, and after reading and analyzing the above cited cases, and many others dealing with Indian treaties in relation to state legislation enacted under the police power, we have reached the conclusion that the better reasoned cases have held state legislation invalid as to the Indians where there was a conflict with treaty stipulations.

We are not here concerned with the plenary right vested in the state under its police power to enact general laws for regulation and conservation of wildlife, as this right has long been recognized where it does not invade rights protected by the United States constitution or a treaty. *Frach v. Schoettler*, 46 Wn.2d 281, 280 P.2d 1038; *Geer v. Connecticut*, 161 U.S. 519, 40 L.Ed. 793, 16 S.Ct. 600; *Patsone v. Pennsylvania*, 232 U.S. 138, 58 L.Ed. 539, 34 S.Ct. 281; *State v. Tice*, 69 Wash. 403, 125 Pac. 168.

The question presented here is whether the rights reserved to the Puyallup Indians by the treaty of Medicine Creek of 1855, and particularly Article III thereof (quoted above), render the Indians immune from the operation of the police power herein sought to be invoked by the state of Washington, when their treaty rights have never been extinguished by the United States. 25 U.S.C.A., Indians, §§ 71, 478(b).

Appellant contends that the state has the power to regulate the time and manner of taking fish, in spite of a valid treaty entered into by the United States and an Indian tribe, so long as the statutory rules and regulations are necessary for the conservation of fish, citing *Tulee v. Washington*, 315 U.S. 681, 86 L.Ed. 1115, 62 S.Ct. 862 (reversing *State v. Tulee*, 7 Wn.2d 124, 109 P.2d 280), and *Ward v. Race Horse*, 163 U.S. 504, 41 L.Ed. 244, 16 S.Ct. 1076.

The *Tulee* case involved the right of this state to enforce a regulation requiring the Yakima Indians to purchase a fishing license. The Yakima treaty of 1859 (12 Stat. 941) contained a clause similar to the one quoted above, and the state relied upon its broad police powers to uphold the licensing act. We held the act valid (*State v. Tulee, supra*), based largely upon the rationale of

Ward v. Race Horse, supra; New York ex rel. Kennedy v. Becker, 241 U.S. 556, 60 L.Ed. 1166, 36 S.Ct. 705, and four of our earlier decisions; *State v. Towessnute,* 89 Wash. 478, 154 Pac. 805; *State v. Alexis,* 89 Wash. 492, 154 Pac. 810, 155 Pac. 1041; *State v. Meninock,* 115 Wash. 528, 197 Pac. 641, and *State v. Wallahee,* 143 Wash. 117, 255 Pac. 94. The supreme court of the United States reversed our decision in the *Tulee* case and held that, although the act was regulatory as well as revenue producing, the exaction of a fee as a prerequisite to fishing at the "usual and accustomed places" could not be reconciled with a fair construction of the Yakima treaty.

In the course of that opinion, the supreme court, speaking through Justice Black, stated

". . . that, while the treaty leaves the state with power to impose on Indians, *equally with others,* such restrictions of a purely regulatory nature concerning the time and manner of fishing outside the reservation as are necessary for the conservation of fish,[3] it forecloses the state from charging the Indians a fee of the kind in question here." (Italics ours.)

Footnote 3 cites the cases of *New York ex rel. Kennedy v. Becker, supra,* and *United States v. Winans, supra.*

While we believe that the language quoted is dictum, the inference contained therein, namely, that the state may enact regulations necessary for the conservation of fish and impose them *equally* upon the Indians who fish outside the reservation at their "usual and accustomed places," is not applicable in the case at bar. This rationale originated in the *Race Horse* and *Kennedy* cases, *supra.* The *Race Horse* case denied the Bannock tribe of Wyoming its treaty-hunting right, based upon a repeal by implication. The *Kennedy* case denied the Seneca Indians of New York their "treaty" right to fish and hunt, unimpaired by state regulation, upon land conveyed by them to Robert Morris. The supreme court, in these two cases, held the right was not one existing against the state which it was bound to respect. These two cases are, therefore, distinguishable upon the ground either that the treaty provisions limited the Indians' reserved rights or that the

Indians anticipated the future sovereign power to limit them.

In the case at bar, appellant does not contend that the treaty rights of the Puyallup Indians were repealed by implication in our enabling act. 25 Stat. 676. *Cf. Tulee v. Washington, supra; State v. McClure, supra.* Nor is it at all clear that the treaty limits the Indians' reserved rights. We conclude that the *Race Horse* and *Kennedy* cases are not controlling here.

In the *Winans* case, the court was concerned with an easement—not a state regulation. Therefore, the case is not authority for the proposition that the state may impose regulations against the Indians under the police power. However, the rules of construction announced therein are equally applicable in the instant case.

The argument frequently presented by the states (as in the case at bar) to the effect that general regulations may be imposed against the Indians *equally with others,* or *in common with citizens,* has been rejected by the courts. *Tulee v. Washington, supra; State v. McClure, supra; State v. Arthur, supra; Makah v. Schoettler, supra.*

We also believe that the language previously quoted from the *Tulee* case was intended to apply only to the factual situations in the cases from which that language was taken. This conclusion is justified because the supreme court, in that case, further stated:

"In determining the scope of the reserved rights of hunting and fishing, we must not give the treaty the narrowest construction it will bear. In *United States v. Winans,* 198 U.S. 371, this court held that, despite the phrase 'in common with citizens of the Territory,' *Article III conferred upon the Yakimas continuing rights, beyond those which other citizens may enjoy, to fish at their 'usual and accustomed places' in the ceded area;* and in *Seufert Bros. Co. v. United States,* 249 U.S. 194, a similar conclusion was reached even with respect to places outside the ceded area. From the report set out in the record before us, of the proceedings in the long council at which the treaty agreement was reached, *we are impressed by the strong desire the Indians had to retain the right to*

hunt and fish in accordance with the immemorial customs of their tribes. It is our responsibility to see that the terms of the treaty are carried out, so far as possible, in accordance with the meaning they were understood to have by the tribal representatives at the council, and in a spirit which generously recognizes the full obligation of this nation to protect the interests of a dependent people. United States v. Kagama, 118 U.S. 375, 384; *Seufert Bros. Co. v. United States, supra,* 198-199." (Italics ours.)

The courts have generally recognized that the treaty right of fishing at "usual and accustomed places" was given to the Indians to provide for their subsistence and as a means for them to earn a livelihood. *United States v. Winans, supra; Makah v. Schoettler, supra; State v. McClure, supra.* Applying a liberal—and not a strained—construction to the treaty of Medicine Creek as a whole, it is our opinion that the Puyallup Indians so understood Article III of the treaty, and that neither the Indians nor the United States intended that the states would or could enforce general regulations against the Indians "equally with others" or "in common with all citizens of the Territory" and thereby deprive them of their right to hunt and fish in accordance with the immemorial customs of their tribes. As we interpret the treaty, we believe that the phrase "in common with all citizens of the Territory" merely granted the white settlers and their heirs and/or grantees a right to fish at these places with the Indians, but that the Indians thereby reserved their right to fish at these places irrespective of state regulation, so long as the right shall not have been abrogated by the United States.

No other conclusion would give effect to the treaty, since to hold that their right was *equal* to that of the citizens of the territory would be to say that they were given no right at all, except that which any citizen subject to state statutes and regulations may enjoy to fish at the "usual and accustomed grounds and stations." This interpretation would permit the state to abrogate their treaty rights at will.

We are convinced that, under the applicable decisions

of the supreme court of the United States referred to herein, the statutes and regulations in the case at bar are in conflict with the treaty provisions, constitute an interference with matters that are within the exclusive scope of Federal power and, therefore, cannot be held valid as to the Puyallup Indians, in relation to their right to fish "at all usual and accustomed fishing grounds and stations."

The further contention is made by appellant that, since the Puyallup Indians have alienated certain lands bordering upon the Puyallup river (which were located within the exterior boundaries of the original Puyallup reservation), they have thus lost their treaty right to fish at those locations. There is nothing to indicate that their treaty right to fish in streams flowing through or bordering upon the reservation has been abrogated by the United States. This court, in the case of *Pioneer Packing Co. v. Winslow*, 159 Wash. 655, 294 Pac. 557, held that the state had no jurisdiction over the Indians, in so far as their right to fish in streams flowing through or bordering upon the reservation was secured to them by a treaty similar to the one above referred to. We are constrained to hold that alienation of the land which was, and is, within the original Puyallup reservation, and which borders upon the Puyallup river, does not alter the character of the right of the Indians to fish upon the river within the exterior boundaries of the *original Puyallup Indian reservation*, in view of the decision in the *Pioneer Packing Co.* case. *Cf. United States v. Winans, supra; State v. McClure, supra:*

That the supreme court still adheres to the views expressed by it in the decisions hereinbefore cited, is indicated by its refusal to review the recent decision of the supreme court of Idaho in *State v. Arthur*, 74 Ida. 251, 261 P.2d 135. That decision is directly in point. In that case there was involved a prosecution of a Nez Perce Indian for violation of a state statute forbidding the killing of deer out of season. The killing was alleged to have taken place on land ceded to the Federal government by the Nez Perce tribe. The defendant demurred to the complaint, relying on the provisions of Article III of the Treaty of 1855, which reserved to the Indians the right

to hunt on open and unclaimed land. The demurrer was sustained, and the action dismissed.

The state of Idaho appealed, and its supreme court affirmed the dismissal. In discussing the relative validity of the police power of the state and the treaty-making power of the United States, the court said:

"If the right exists in the State to regulate the killing of game upon open and unclaimed lands ceded by the Nez Perce Indians to the United States, it follows that such right is to be exercised under the police power of this state. Generally stated, the police power under the American constitutional system has been left to the states. It has been considered a power inherent in and always belonging to the states and not a power surrendered by the respective states to the federal government or by the federal government restricted under the United States Constitution. It is under this further general proposition that the State claims its source and scope of power to prohibit killing deer during certain times of the year in the interests of conservation of wild life. That the State has and may exercise such power generally is not the question; this power is limited in the enactment of laws and regulations to the extent that the same are not repugnant to any constitutional provisions of either the State or the Federal Constitution. Is the law and regulation as to a closed season repugnant to rights reserved under the Treaty of 1855?

"The Constitution of the United States does not contain any provisions which expressly limit the police power of any state; however, it does forbid the exercise of certain powers by the state under Art. 1, § 10, of the Federal Constitution, including the inhibition against any state passing any laws impairing the obligation of contracts; moreover, Art. 6, cl. 2 of the Federal Constitution expressly declares that the Federal Constitution and the laws of the United States made in pursuance thereof, and all treaties made, or which shall be made, shall be the supreme law of the land, binding upon the judges in every state notwithstanding anything in the Constitution or laws of any state to the contrary. Hence the federal government is paramount and supreme within the scope of

powers conferred upon it by the Constitution and it follows that a state must exercise its police power subject to constitutional limitations, if any; the statute of any state, enacted pursuant to its police power which conflicts with any treaty of the United States constitutes an interference with matters that are within the exclusive scope of federal power and, hence, cannot be permitted to stand. 16 C.J.S., Constitutional Law, § 196, page 565; the treaty being superior to a particular state law and regulation, though the state law and regulation involved is otherwise within the legislative power of the state, the rights created under the treaty cannot thus be destroyed; this in effect holds the application of the statute in abeyance during the existence of the obligation of the treaty. 63 C.J., § 29, pp. 844-45. This recognizes the principle that the provisions of the United States Constitution shall elevate treaties of the federal government over state legislation though the state legislation appertains to the state police power. 11 Am. Jur., § 255, p. 987."

After discussing *Tulee v. Washington, supra,* and holding that the *Race Horse* and *Kennedy-Becker* cases had been rejected by the supreme court of the United States in subsequent decisions, the Idaho court continued:

"We are not here concerned with the general right vested in the State under its police power to enact reasonable laws for the conservation of wild life; this right has long been recognized and whenever it can be done without violating any organic act of the land or without invasion of rights protected by constitution or treaty, it is recognized. The question here is whether or not the preexisting ancient Indian hunting rights which were reserved to them in the Treaty of 1855 may have attached to such rights the exercise of the police power of the State. It is primarily a question of whether or not the police power here sought to be invoked by the State ever has attached to or can apply to such rights without the consent of such Indians or by positive act on the part of the federal government extinguishing the right which was reserved in the Indians and thus far has never passed from them to the people, to the state, or to the nation.

"One of the primary purposes of licensing in reference to fishing and hunting is to conserve wild life; the law is essentially a regulatory act rather than a revenue act. To exact a license under the claimed police power, which the Supreme Court of the United States held could not be done in the case of *Tulee v. Washington, supra,* and which the Supreme Court of Idaho held could not be done in the case of *State v. McConville,* [*supra*], certainly would be less onerous upon the affected Indian tribes than the enactment of legislation under the claimed police power limiting the killing of game or prohibiting fishing in certain areas or doing either during certain times of the year. While both fishing and hunting are primarily sport and recreation for most fishermen and hunters, this is not so with respect to the Indians; they have always fished and hunted to obtain food and furs necessary for their existence and have been controlled as to the time when and the area where and the amount of catch or kill by the exigencies of the occasion; while no doubt this was more so in 1855 than it is now, the fact remains that it is to a lesser extent also true today; be that as it may, their rights reserved in this respect should be determined in the light of conditions existing at the time of the treaty and the manifest intent of all contracting parties at that time. Under the holding of the *Tulee* and *McConville* cases the Supreme Court of the United States in the first case and the Supreme Court of this state in the second case have definitely held that to exact a license fee from the Indians in order to fish, and I assume the same would be true with reference to hunting, could not be reconciled with the rights reserved under the treaty. The decision in each case was not premised on burden but upon principle; surely the exaction of a $2 fishing license would not unduly burden an Indian who desires to fish nor would it likely cause him to forego this reserved right. His rights of an equal, if not of a superior nature under the treaty to hunt upon open and unclaimed lands, because less restricted by the language of the treaty should upon principle and fair dealing be protected against state laws which limit him to hunt at certain times of the year in common with all other citizens. This would mean that at certain times of the year his otherwise ancient right recognized by the treaty and never extinguished

would for all practical purposes be extinguished. If the position of the State is sustained the assurance given by Governor Stevens that they could kill game when they pleased and the provision of the treaty reserving to them the right to hunt upon open and unclaimed lands is no right at all. Out of the solemn obligations of the treaty, and the express reserved property right which never passed from the Indians to anyone and which the federal government has never extinguished but has expressly recognized before and after Idaho was admitted to the Union, the Nez Perce would now have no right in any respect different than that enjoyed by all others, except perhaps the freedom from the burden of a license fee. This was never intended under the broad, fair and liberal construction of the treaty. The Supreme Court of the United States has recognized and expressly held that the Indian treaty fishing provisions accorded to them rights which do not exist for other citizens. *Tulee v. Washington, supra*; *Seufert Bros. Co. v. United States, supra*; *United States v. Winans, supra*. What are such rights under the State's theory? Perhaps to hunt without a license. If such rights exist as to fishing most assuredly they exist as to hunting. If the State can regulate the time of year in which they may hunt then they are accorded no greater rights in this respect than exist for other citizens."

The court concluded its opinion by holding that the treaty rights reserved by the Nez Perce Indians still existed unimpaired, and that they could hunt at any time of the year on the lands involved in the case.

The supreme court of the United States in 1954 denied the state of Idaho's petition for certiorari in that case. See 347 U.S. 937, 98 L.Ed. 1087, 74 S.Ct. 627. This action on the part of the supreme court was of unusual significance because the Idaho court was interpreting the supremacy clause of the United States constitution and a treaty made in pursuance thereof, a function which could only be authoritatively performed by the supreme court itself.

Since only the supreme court of the United States has the power to *finally* interpret the meaning of the United

States constitution and treaties made in pursuance thereof, and since it has, from 1832 (*Worcester* case, *supra*) to 1954 (*Arthur* case, *supra*), directly and indirectly upheld the supremacy of rights reserved in Indian treaties over state statutes having the effect of impairing or abrogating those rights, this court is bound by its applicable decisions.

In the instant case, the statutes and regulations involved cannot be held to be applicable to the Puyallup Indians. Therefore, the trial court's judgment dismissing the action was correct, even though its reason (to wit, that the state had failed to sustain the burden of showing as to the Puyallup Indians that the statutes and regulations were reasonable and necessary for the conservation of fish) was wrong. Their reasonableness, or unreasonableness, is immaterial.

Where a judgment or order is correct, it will not be reversed because the court gave a wrong or insufficient reason for its rendition. *Kirkpatrick v. Department of Labor & Industries*, 48 Wn.2d 51, 290 P.2d 979.

One more matter must be noticed. The conclusion we have reached from our interpretation of the applicable decisions of the supreme court makes necessary the overruling of four of our prior cases, namely, *State v. Towessnute*, *supra*; *State v. Alexis*, *supra*; *State v. Meninock*, *supra*; and *State v. Wallahee*, *supra*. These cases are wrong in principle, and, to the extent that they are contrary to the views stated herein, they are hereby expressly overruled. See the dissenting opinions in those cases and in *State v. Tulee*, *supra*.

To summarize, the treaty of Medicine Creek of 1855 is the supreme law of the land and, as such, is binding upon this court, notwithstanding any statute of this state to the contrary, and its provisions will continue to be superior to the exercise of the state's police power respecting the regulating of fishing at the places where the treaty is applicable until:

(1) The treaty is modified or abrogated by act of Congress, or

(2) The treaty is voluntarily abandoned by the Puyallup tribe, or

(3) The supreme court of the United States reverses or modifies our decision in this case.

Judgment affirmed.

SCHWELLENBACH, OTT, and FOSTER, JJ., concur.

ROSELLINI, J. (concurring in the result)—The conservation of the natural resources of this state is a matter of vital importance to all of its inhabitants. The right of the state to enforce its conservation measures is a matter that I do not think should be determined by reference to an opinion of a court of another state when that state chose to ignore language of the United States supreme court that reads:

"The treaty leaves the state with power to impose on Indians, equally with others, such restrictions of a purely regulatory nature concerning the time and manner of fishing outside the reservation as are necessary for the conservation of fish." *Tulee v. Washington*, 315 U.S. 681, 86 L.Ed. 115, 62 S.Ct. 862.

We have used language of similar import to this in every case in which the question of interpretation of Indian treaty rights has been considered. See *State v. Towessnute*, 89 Wash. 478, 154 Pac. 805; *State v. Alexis*, 89 Wash. 492, 154 Pac. 810, 155 Pac. 1041; *State v. Meninock*, 115 Wash. 528, 197 Pac. 641; *State v. Wallahee*, 143 Wash. 117, 255 Pac. 94; *State v. Tulee*, 7 Wn.2d 124, 109 P.2d 280.

Moreover, I do not think that this court is justified in assuming that, because the supreme court denied certiorari in *State v. Arthur*, 74 Idaho 251, 261 P.2d 135, it approved the holding of that case. That court clearly stated that such an assumption is never warranted. *Atlantic Coast Line R. Co. v. Powe*, 283 U.S. 401, 75 L. Ed. 1142, 51 S. Ct. 498; *United States v. Carver*, 260 U.S. 482, 67 L.Ed. 361, 43 S.Ct. 181; *House v. Mayo*, 324 U.S. 42, 89 L.Ed. 739, 65 S. Ct. 517; *Sunal v. Large*, 332 U.S. 174, 91 L.Ed. 1982, 67 S.Ct. 1588.

Contrary to the Idaho holding are the cases of *Makah Indian Tribe v. Schoettler*, 192 F.2d 224 (C.A. 9th) and *McCauley v. Makah Indian Tribe*, 128 F.2d 867 (C.A. 9th), both of which recognize: (a) the power of the state to subject Indians to restrictions for the purpose of conservation; and (b) that their right to fish, granted by the treaty, is not an unlimited right. The majority, however, chose to ignore these decisions rendered by the Federal circuit court in this state, and to adopt an interpretation of the treaty which deprives the state of all right to protect its fish for the benefit of all of its citizens.

The importance of the conservation measures adopted by the state of Washington may be better understood if some of the factors and problems involved are examined. This information, unfortunately, was not presented in evidence in the trial of this cause, but was gleaned from my own research. While these facts cannot control our decision, I do think that they emphasize the importance of the case and, therefore, should be considered before we decide that the state has no right at all to interfere with the fishing practices of Indians.

This case involves the trapping of salmon and steelhead by means of nets in the Puyallup river. There are five or six species of Pacific salmon; and there are two species of steelhead, those that migrate in the winter and those that migrate in the summer. The anadromous fish are hatched in fresh water and descend to salt water where most of their growth is attained. They have a well-developed homing instinct and return to spawn either in the streams of their birth or the streams where they are planted as fingerlings.

The Pacific salmon spawn only once and always die after spawning; the steelhead may spawn more than once. The salmon and steelhead after remaining in the ocean from three to six years, depending upon their species, return as mature fish to the river of their origin to spawn. They spawn in the upper reaches of the rivers and bury their eggs in the gravel beds. The mature fish usually travel close to the river banks during their spawning migration.

The problems of properly managing and preventing the

extinction of this vast fishery resource are of real concern to the state. The Washington department of fisheries, in its 1953 report, placed the capitalized value of fish and shell fish resources in this state at $679,150,000. To this value must be added the contribution of salmon as a recreational asset. In recent years, from 150,000 to 200,000 fishermen have participated in saltwater sport angling on Puget Sound, in waters along the coast of Washington, in the Columbia river as far upstream as Wenatchee, and in other salmon-producing rivers. They spend $8,500,000 annually on fishing trips. There are 160 boathouses and resorts with an investment value of $12,000,000.

The state regulations to conserve and preserve fishery are vital activities in the over-all scheme of administering this resource in such a way that it can provide a constant source of food, wealth, and recreation.

The International Halibut Commission and the International Sockeye Salmon Commission have effectively demonstrated how two nearly extinct species (halibut and sockeye) have been restored by the promulgation and enforcement of conservation laws and regulations.

The methods commonly used to conserve the fish have been to regulate the season's catch and the gear used, to the end that sufficient fish escape to propagate and reproduce themselves. The fish hatchery is essential in combating the depletion of fish runs. Without artificial propagation, the maintenance and rehabilitation of this resource would be impossible. The Washington game department's record of planting and catching steelhead in the Puyallup river is persuasive of the need for this artificial propagation.

PUYALLUP RIVER

Year	*Steelhead Plants*	*Year*	*Steelhead Returns*
1945	37,694		
1946	65,877		
1947	177,596	1947-48	1,771
1948	53,467	1948-49	3,291
1949	298,300	1949-50	* 4,821
1950	283,914	1950-51	4,808
1951	66,462	1951-52	**14,592
1952	174,682	1952-53	14,190
1953	81,124	1953-54	16,886
1954	53,935	1954-55	13,351
1955	70,270	1955-56	18,496
1956	56,876	1956-57	(Data not yet available)

*(1950 first true downstream migrants planted)
**(First return of hatchery fish)

The defendants herein had two set nylon nets in the Puyallup river. The shorter one was 80 feet in length and 20 feet in width or depth, with 6½-inch diamond-shaped webbing. The longer net was the same, except that it was 140 feet in length. The shorter net was anchored at one end to the bank by means of a rock; and the longer net was upstream from the shorter one and anchored to the bank by means of piling. The opposite ends of each net were anchored with pilings in the stream, each net running at right angles to the bank of the river.

When fish attempt to migrate upstream, they are caught and become enmeshed by their gills in the webbing of set nets. Nylon nets are a new device; they are practically invisible in the water. Such nets are so constructed that they take practically every fish that attempts to go upstream.

Any obstruction that prevents the anadromous fish from escaping to its spawning ground will destroy that particular fish run. The regulations in question were enacted to prevent such obstructions and other interference with the fish during the spawning season. I do not think it can be seriously questioned that such laws and regulations for conservation, as generally applied, are reasonable.

The majority chose to enlarge the ruling of *Tulee v. State, supra,* that the state has no right to exact a license fee from the Indians for a privilege guaranteed to them by the treaty with the United States. It enlarged this ruling to a holding that state regulations designed to conserve the fish may not be enforced against the Indians. The majority opinion does this in spite of the fact that it recognizes the right of the state to impose such restrictions outside the reservation, and in spite of the fact that the treaty provides that the right is to be "enjoyed in common with all the citizens of the Territory."

The treaty with the Indians should be construed in the light of the conditions and circumstances existing at the time it was executed. It was never anticipated nor imagined at that time that the present technological advances in the method of taking fish would be developed. Nylon net was unknown. The Indians did not possess the technical knowledge nor materials to manufacture nets in lengths sufficient to span an entire stream. The outboard motor was nonexistent.

To interpret the treaty in a manner that would permit the Indians to use the best and most advanced techniques and equipment to the extent that the fish are destroyed would, in my opinion, go far beyond what was intended either by the citizens of the Territory or the Indians. *Inherent in the treaty is the implied provision that neither of the contracting parties would destroy the very right and bounty which each sought to share.*

The argument is made that if the state may forbid fishing during certain seasons, it may forbid it altogether, but the unreasonableness of such a law should be manifest.

As a practical matter, it has been determined that unless these conservation measures are enforced, the fish will become extinct and the Indians' rights will become worthless. If the Indians will accept the benefit of the state's activities directed to the preservation and replenishing of the supply of fish, they should accept also the burden incident to these measures. Surely it was never contemplated that the right given to the Indian should

be used to destroy the means of his enjoying that right—a destruction that would affect not only the Indians but also the other citizens entitled to fish the waters of the state.

The trial court decided this case against the state on the ground that the state had failed to sustain the burden of proving that the regulation was reasonable and necessary or rather, that the enforcement of the regulation against the defendants was reasonable and necessary for the preservation of fish. In doing so, the court adopted the holding of *Makah v. Schoettler, supra.* It is the general rule that such a regulation is presumed to be valid and the burden of proving its invalidity is upon the party challenging the regulation. The court, however, felt that in such a case as this—where the enforcement of the regulation, if not reasonable and necessary, would infringe a treaty right of the Indian—the burden should be upon the state to show that the violation of the regulation by the Indian threatens the conservation program. I would uphold the trial court in its disposition of the cause, for it is true that the state made no attempt to show that the conservation program was seriously affected by the fishing activities of the defendants or of the Indians generally. But I would not go further, as the majority has, to say that the treaty intended that the state may never interfere with fishing by Indians in their usual and accustomed places, no matter how wasteful and destructive their fishing may be. Such a holding is unnecessary to a decision of the case. Furthermore, I think it is unwarranted under the facts and the law.

For these reasons, I would affirm the trial court's judgment.

HILL, C. J. FINLEY, and MALLERY, JJ., concur with ROSELLINI, J.

FINLEY, J. (concurring in the result)—I have signed the concurring opinion written by Judge Rosellini and join in the views expressed therein, but wish to add the following brief comments:

Considering their length and depth, the modern nylon

nets used by defendants if placed in the river and left there, as in the instant case, unquestionably would constitute a hazard to the escapement upriver of spawning salmon and steelhead during certain periods of the year. The extent or the degree of the seriousness of the hazard in terms of conservation and rehabilitation of fish life is a matter that would be subject to proof, as in any other case.

In this connection, it should be noted that the instant case focuses attention only upon defendants and their nets. Considering the matter of conservation and the equally, if not more, important matter of rehabilitation of the fish runs in the rivers and streams of this state in relation to reasonable police power regulations, the problem posed would seem to involve not only the question of the use and effect of the modern nylon nets of defendants, but the use and effect of such nets by numbers of other individuals, including other Puyallup Indians.

The majority opinion states that the constitution of the United States and the treaties enacted or promulgated pursuant thereto unquestionably have been held to constitute the supreme or controlling law of the land. With this I agree without any reservation whatsoever. But the constitution and the treaties enacted pursuant thereto are basic documents of government. They do not in and of themselves spell out and govern specifically the myriad details and day-to-day implications which may and do arise in relation to such documents of government. Such definition enunciation normally falls within other areas of social control; *i.e.*, within the proper ambit of the legislature or the judiciary. Under our system of government, there should no longer be any doubt as to (1) the validity of the doctrine of judicial review, (2) the supremacy of the judiciary in this respect, and (3) that interpretation and clarification of constitutional, statutory, or treaty provisions by the judiciary are acceptable and established principles. The problem in the instant case must be viewed in this light, and I think the fundamental question is the reasonableness of the police power regulation attempted by the state of Washington.

Setting aside, merely for the moment, any discussion or

consideration of constitutional and treaty provisions, there should be little doubt that reasonable police power regulation as an abstract matter would be desirable when, as, and if, necessary to prevent the depletion or absolute destruction of fish life in the rivers and streams of this state. This should be true from the standpoint of the Indians, as well as of other residents of the state. Now, if we turn back several decades, in view of the then overabundant quantities of fish in the rivers, streams, lakes, and other waters of the Pacific Northwest, it is unlikely that the parties to the Indian treaty contemplated any necessity for scientific conservation and rehabilitation; but what would the attitude of the makers of the Indian treaty have been, if they had considered or had been confronted with the problem of conservation and rehabilitation? As to this question, the majority opinion would attribute an abysmal ignorance and lack of intelligence both to our constitution makers and to the signatories of the Indian treaties. The assumption inherent in this, I think, is unwarranted.

As to the validity of the state regulaton here involved, I think the inquiry of the court should be directed to the intent and purpose of the treaty makers in the same manner that judicial inquiry is made respecting intent and purpose in the process of interpretation and application of any provisions of our state or Federal constitutions.

The basic purpose of the treaty was to preserve, not to destroy, the fishing rights of the Indians. As I see the problem in the case at bar, it is simply one of approach or orientation regarding (a) the interpretation and application of constitutional and treaty provisions and (b) the nature of the judicial function in relation thereto. If even one judicial eye is kept open respecting the fundamental purpose of the treaty to protect Indian fishing rights, and if this purpose is evaluated intelligently in terms of the settlement and the development of our state which has taken place most significantly in the last fifty years, then it seems to me that the state of Washington, as a matter of constitutional right, should have at least an opportunity to prove by competent factual data that the police power regulation here involved is a reasonable one, not incon-

sistent with the purpose of the Indian treaty but in furtherance thereof, from which the courts might or might not conclude that the regulation would be valid. In other words, as Judge Rosellini suggests, the problem is one of proof.

It may be suggested, and if so it is certainly true, that the Puyallup Indians did not encourage or sponsor, and are not to be held morally or legally responsible for, the increase in population and the development of the state of Washington. However, this significant increase in population and the development of the state were not prohibited by the terms of the Indian treaty. Even if not contemplated, the changes that have taken place were perhaps inevitable. In any event, the changes have taken place and are now with us and the Indians as well.

Judicial recognition of the fundamental purpose of the treaty (*i.e.*, the preservation of Indian fishing rights) and judicial recognition of the facts of life relative to conservation and rehabilitation of fish are not inconsistent. Such judicial action is not in derogation and in violation of the Indian treaty, but is in furtherance thereof. In his concurring opinion, Judge Rosellini states that the only question in this case is whether the state has proved by competent evidence that regulation of fishing nets in the river is reasonably designed and necessary for the preservation of fish life for the benefit of the Indians, as well as for other residents of this state. I agree. For the above reasons and those stated by Judge Rosellini, I concur in the end result reached by the majority opinion—namely, that the decision of the trial court should be affirmed.

ADDENDUM BY HILL, C.J. The eight judges who heard the *En Banc* argument on this case on February 13, 1957 (Judge Weaver being incapacitated at that time), are agreed that the order of the trial court dismissing the charges against the two defendants should be affirmed, but they are in disagreement as to the reason for the affirmance.

Three judges have signed Judge Donworth's opinion, and three judges have signed Judge Rosellini's opinion and there is no majority opinion. It therefore follows that

the cases which Judge Donworth's opinion states are overruled, are not in fact overruled, and nothing is decided except that the order dismissing the charges against the defendants is affirmed.

OCTOBER TERM, 1939

Syllabus.

UNITED STATES *v.* UNITED STATES FIDELITY & GUARANTY CO. ET AL.

Certiorari to the Circuit Court of Appeals for the Tenth Circuit

CERTIORARI, 308 U.S. 548, to review the affirmance of a judgment of the District Court for the Eastern District of Oklahoma, 24 F. Supp. 961, which, in reliance upon a judgment of the District Court for the Western District of Missouri, rejected a claim made by the United States on behalf of the Choctaw and Chickasaw Nations and allowed against them a counter-claim of interveners.

Solicitor General Biddle, with whom *Assistant Attorney General Littell* and *Mr. Thomas E. Harris* were on the brief, for the United States.

Messrs. Bower Broaddus and *Julian B. Fite* for respondents.

The counterclaim is not against the United States but the Tribes. *United States v. Algoma Lumber Co.*, 305 U.S. 415; *Folk v. United States*, 233 F. 177; *United States v. Ft. Smith & Western Ry. Co.*, 195 F. 211.

The federal court in Missouri had jurisdiction to render an affirmative judgment against the Tribes. Act of April 26, 1906, § 18; c. 1876, 34 Stat. 137, 144, considered with statutes conferring jurisdiction on the District Courts.

A transitory action in the name of the United States must be brought in the district in which the defendant resides.

Congress has consented to an affirmative judgment

against the Tribes, and any right to have the claim confined in the federal courts of Oklahoma was waived by contesting the claim in Missouri. Dist'g *Illinois Central R. Co. v. Public Utilities Comm'n*, 245 U.S. 493. See, *Peoria & Pekin Union R. Co. v. United States*, 263 U.S. 528, 535; *Richardson v. Fajardo Sugar Co.*, 241 U.S. 44, 47.

The determination of the question of jurisdiction by the court in Missouri may not be assailed collaterally. *Chicot County Drainage Dist. v. Baxter State Bank*, 308 U.S. 371; *Stoll v. Gottlieb*, 305 U.S. 165.

When the claim of the Tribes was submitted to the Missouri court the United States and the Tribes were litigants like any other suitor. *Richardson v. Fajardo Sugar Co.*, 241 U.S. 44; *Porto Rico v. Ramos*, 232 U.S. 627; *Folk v. United States*, 233 F. 177. The Tribes as now constituted are not sovereigns immune from suit. The defense of sovereign immunity was waived.

As the court in Missouri had jurisdiction, its judgment was binding in the Oklahoma suit. Dist'g *United States v. Eckford*, 6 Wall. 484. When suing on behalf of the Tribes, the United States has no greater right than they. *Folk v. United States*, 233 F. 177; *United States v. Ft. Smith & Western Ry. Co.*, 195 F. 211.

The matter before the court in Missouri was one to which its jurisdiction would extend between ordinary litigants, as the suit arose under the laws and treaties of the United States, Jud. Code 24(1), 28 U.S.C. § 41(1).

The case was in equity, so whether the right to counterclaim be procedural or substantive (see *The Gloria*, 286 F. 188), the defendant could interpose it and obtain an affirmative judgment. Equity Rule 30.

The trend of modern authorities is to differentiate between the authority to render a judgment and the authority to order its enforcement. *The Gloria*, 286 F. 188; *The Newbattle*, 10 Prob. Div. 33; *United States v. Nuestra Senora De Regla*, 108 U.S. 92; *The Paquete Habana*, 189 U.S. 453; *United States v. The Thekla*, 266 U.S. 328; *Guaranty Trust Co. v. United States*, 304 U.S. 126;

Dexter and Carpenter v. Kunglig Jarnvagsstyrellsen, 43 F.2d 705; *Russia v. Bankers' Trust Co.*, 4 F. Supp. 417, affirmed *United States v. National City Bank of New York*, 83 F.2d 236, cert. den. 299 U.S. 563.

When the judgment was rendered in Missouri the claim theretofore existing was merged in it. *Wycoff v. Epworth Hotel Co.*, 146 Mo. App. 554.

The interveners came in as party defendants, without objection, and their claim was properly allowed under the Act of 1906.

MR. JUSTICE REED delivered the opinion of the court.

This certiorari brings two questions here for review: (1) Is a former judgment against the United States on a cross-claim, which was entered without statutory authority, fixing a balance of indebtedness to be collected as provided by law, *res judicata* in this litigation for collection of the balance; and (2) as the controverted former judgment was entered against the Choctaw and Chickasaw Nations, appearing by the United States, does the jurisdictional act of April 26, 1906, authorizing adjudication of cross demands by defendants in suits on behalf of these Nations, permit the former credit, obtained by the principal in a bond guaranteed by the sole original defendant here, to be set up in the present suit.

Certiorari was granted[1] because of probable conflict, on the first question, between the judgment below and *Adams v. United States*[2] and because of the importance of clarifying the meaning of the language in *United States v. Eckford*[3] relating to the judicial ascertainment of the indebtedness of the Government on striking a balance against the United States where cross-claims are involved. A somewhat similar question arises in *United States v. Shaw*.[4] The second question was taken because its solution is involved in certain phases of this litigation.

The United States, acting for the Choctaw and Chick-

1. 308 U.S. 548.
2. 3 Ct. Cls. 312.
3. 6 Wall. 484.
4. *Ante*, p. 495.

asaw Nations, leased some coal lands to the Kansas and Texas Coal Company, with the respondent United States Fidelity and Guaranty Company acting as surety on a bond guaranteeing payment of the lease royalties. By various assignments the leases became the property of the Central Coal and Coke Company, as substituted lessee, the Guaranty Company remaining as surety. The Central Coal & Coke Company went into receivership in the Western District of Missouri, and the United States filed a claim for the Indian Nations for royalties due under the leases. Answering this claim, the Central Coal and Coke Company denied that any royalties were owing and claimed credits against the Nations for $11,060.90. By order of the court, reorganization of the Coal Company under § 77B of the Bankruptcy Act was instituted and the trustee took possession from the receivers. In the reorganization proceedings the claim of the Nations was allowed for $2,000, the debtor's cross-claim was allowed for $11,060.90, and the court on February 19, 1936, decreed a balance of $9,060.90 in favor of the debtor, to be "collected in the manner provided by law." No review of this judgment of the Missouri district court was ever sought.

On December 24, 1935, the United States, on its own behalf and on behalf of the Indian Nations, filed the present suit in the Eastern District of Oklahoma against the Guaranty Company, as surety on the royalty bond, for the same royalties involved in the Missouri proceedings. After the judgment of the Missouri district court, the Guaranty Company pleaded that judgment as a bar to recovery by the United States. The trustee of Central Coal and Coke Company, and the Central Coal and Coke Corporaton, which had taken over certain interest in the assets of the Coal Company, alleged by a petition for leave to intervene, and, upon its allowance without objection, by an intervening petition, that they were necessary and proper parties because each had an interest in the judgment of the Missouri court; they pleaded the Missouri judgment as determinative and pleaded the merits of the counterclaims by setting up the facts which supported the judgment; they asked for a decree that the

Missouri judgment was valid, for a determination of accounts between themselves and the Indian Nations, and for all other proper relief. Replying to the answer of the surety and the petition of the interveners, the United States pleaded that the Missouri judgment was void as to the interveners' cross-claims because the court was "without jurisdiction to render the judgment" against the United States and denied the cross-claims on the merits. The district court concluded that the Missouri judgment barred the claim against the surety and entitled the interveners to a judgment against the Indian Nations in the amount of the balance found by the Missouri court. This judgment the Circuit Court of Appeals affirmed.[5]

A.—By concession of the Government the validity of so much of the Missouri judgment as satisfies the Indian Nations' claim against the lessee is accepted. This concession is upon the theory that a defendant may, without statutory authority, recoup on a counterclaim an amount equal to the principal claim.[6]

B.—We are of the view, however, that the Missouri judgment is void in so far as it undertakes to fix a credit against the Indian Nations. In *United States v. Shaw*[7] we hold that cross-claims against the United States are justiciable only in those courts where Congress has consented to their consideration. Proceedings upon them are governed by the same rules as direct suits. In the Missouri proceedings, in corporate reorganization, the United States, by the Superintendent of the Five Civilized Tribes for the Choctaw and Chickasaw Nations, filed a claim on behalf of the Indian Nations. This it is authorized to do.[8] No statutory authority granted jurisdiction to the Missouri Court to adjudicate a cross-claim against the

5. 106 F.2d 804.

6. *Bull v. United States*, 295 U.S. 247, 261.

7. *Ante*, p. 495.

8. *Heckman v. United States*, 224 U.S. 413, 442; *Mullen v. United States*, 224 U.S. 448, 451; *United States v. Rickert*, 188 U.S. 432. These cases discuss, also, the relationship between the United States and the Choctaw and Chickasaw Nations. See also *United States v. Choctaw etc. Nations*, 179 U.S. 494, 532; *Choctaw Nation v. United States*, 119 U.S. 1, 28.

Act of June 7, 1897, 30 Stat. 62, 83; Atoka Agreement, 30 Stat. 495,

United States.[9] The public policy which exempted the dependent as well as the dominant sovereignties from suit without consent[10] continues this immunity even after dissolution of the tribal government. These Indian Nations are exempt from suit without Congressional authorization.[11] It is as though the immunity which was theirs as sovereigns passed to the United States for their benefit, as their tribal properties did. Possessing this immunity from direct suit, we are of the opinion it possesses a similar immunity from cross-suits. This seems necessarily to follow if the public policy which protects a quasi-sovereignty from judicial attack is to be made effective. The Congress has made provision for cross-suits against the Indian Nations by defendants.[12] This provision, however, is applicable only to "any United States court in the Indian Territory." Against this conclusion respondents urge that as the right to file the claim against the debtor was transitory, the right to set up the cross-claim properly followed the main proceeding.[13] The desirability for complete settlement of all issues between parties, must, we think, yield to the principle of immunity. The sovereignty possessing immunity should not be compelled to defend against cross-actions away from its own territory or in courts of its own choice, merely because its debtor was unavailable except outside the jurisdiction of the sovereign's consent. This reasoning is particularly applicable to Indian Nations with their unusual governmental organization and peculiar problems.

But, it is said that there was a waiver of immunity by a failure to object to the jurisdiction of the Missouri District Court over the cross-claim. It is a corollary to immu-

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505; Act of March 3, 1901, 31 Stat. 1447; Act of April 26, 1906, 34 Stat. 137, 144. Under § 28 of the Act of April 26, 1906, the tribal existence of the Chickasaw and Choctaw Nations is continued as modified by that and other acts.

9. Cf. *United States v. Algoma Lumber Co.*, 305 U.S. 415.

10. Cf. *Cherokee Nation v. Georgia*, 5 Pet. 1.

11. *Turner v. United States*, 248 U.S. 354, 358; *Adams v. Murphy*, 165 F. 304, 308; *Thebo v. Choctaw Tribe of Indians*, 66 F. 372.

12. Act of April 26, 1906, § 18, 34 Stat. 137, 144, 148.

13. Cf. *Fidelity Ins., Trust and S. D. Co. v. Mechanics' Sav. Bank*, 97 F. 297, 303.

nity from suit on the part of the United States and the Indian Nations in tutelage that this immunity cannot be waived by officials. If the contrary were true, it would subject the Government to suit in any court in the discretion of its responsible officers. This is not permissible.[14]

The reasons for the conclusion that this immunity may not be waived govern likewise the question of *res judicata*. As no appeal was taken from this Missouri judgment, it is subject to collateral attack only if void. It has heretofore been shown that the suability of the United States and the Indian Nations, whether directly or by cross-action, depends upon affirmative statutory authority. Consent alone gives jurisdiction to adjudge against a sovereign. Absent that consent, the attempted exercise of judicial power is void. The failure of officials to seek review cannot give force to this exercise of judicial power. Public policy forbids the suit unless consent is given, as clearly as public policy makes jurisdiction exclusive by declaration of the legislative body.[15] *Chicot County Drainage District v. Baxter State Bank*[16] is inapplicable where the issue is the waiver of immunity.

In the *Chicot County* case no inflexible rule as to collateral objection in general to judgments was declared. We explicitly limited our examination to the effect of a subsequent invalidation of the applicable jurisdictional statute upon an existing judgment in bankruptcy.[17] To this extent the case definitely extended the area of adjudications that may not be the subject of collateral attack. No examination was made of the susceptibility to such objection of numerous groups of judgments concerning status,[18] extra-territorial action of courts,[19] or

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14. *Minnesota v. United States*, 305 U.S. 382, 388 and cases cited; *Munro v. United States*, 303 U.S. 36, 41; *Finn v. United States*, 123 U.S. 227, 232.

15. *Kalb v. Feuerstein*, 308 U.S. 433.

16. 308 U.S. 371.

17. See the last paragraph of the opening statement and the first paragraph of division *Second*. 308 U.S. 374, 376.

18. *Andrews v. Andrews*, 188 U.S. 14.

19. *Fall v. Eastin*, 215 U.S. 1.

strictly jurisdictional and quasi-jurisdictional facts.[20] No solution was attempted of the legal results of a collision between the desirable principle that rights may be adequately vindicated through a single trial of an issue and the sovereign right of immunity from suit. We are of the opinion, however, that without legislative action the doctrine of immunity shall prevail.

C.—The conclusion that the Missouri judgment is void determines this review. There is left in the case, however, an issue which requires brief reference to the second question upon which certiorari was granted. The intervening petition set up the facts supporting the claim of the interveners against the Indian Nations. An issue was made and the evidence of the Missouri controversy stipulated for consideration in the present case. As the district court determined that the Missouri judgment was valid, no finding or conclusion appeared in the judgment of the district court upon the merits. Respondents made no objection to this omission but call attention to it in their brief. On a new trial this issue obviously will be important.

It is the contention of the Government that the cross-claim cannot be liquidated in this proceeding for the reason that by the statute under which this suit is brought, the right to set up a cross-claim is limited to "party defendants."[21] Respondents' reply that as they were admitted as interveners without objection, as they have an interest in cross-claims arising from the same transactions which form the basis of the principal suit, and as one of them is a principal liable for any judgment against the defendant surety, they are to all intents and purposes defendants under § 18 of the Act of April 26, 1906.

As this judgment was entered before the effective date of the Civil Rules, procedure as to parties was governed by the Conformity Act.[22] Apparently under Oklahoma

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20. *Noble v. Union River Logging R. Co.*, 147 U.S. 165; cf. *Johnson v. Zerbst*, 304 U.S. 458.

21. 34 Stat. 137, § 18:

22. R. S. 914; *Sawin v. Kenny*, 93 U.S. 289; *United Mine Workers v. Coronado Co.*, 259 U.S. 344, 382.

law the principal in the bond could not compel its admission as a party defendant.[23] As the Government did not object to the order filing the intervening petition, we assume it properly filed and that the trustee for the Coal Company was actually a defendant. The name used is immaterial.

Whether the Coal Company was such a defendant as was meant by § 18 raises other questions. Since they depend upon an interpretation of the federal statute they are to be determined by federal, not Oklahoma, law.[24] As the extent and character of the interest of the assignee Coal Corporation in the unliquidated claims of the Company do not appear from the record, we do not pass upon the question of whether the Company defendant has any cross-claim against the Indian Nations, after satisfaction of the Indian Nations' claim against it or whether, if there is such a claim, owned jointly with the Corporation, it is a claim the Company may enforce as defendant under § 18.

The cause is reversed and remanded to the district court for further proceedings in accordance with this opinion.

Reversed.

MR. JUSTICE MCREYNOLDS took no part in the decision of this case.

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23. *Fidelity & Deposit Co. v. Sherman Machine & Iron Works*, 62 Okla. 29.

24. *Board of County Commissioners v. United States*, 308 U.S. 343, and *Deitrick v. Greaney*, *ante*, p. 190.